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**Administrative Conference
of the United States**

FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK

Statutes and Related Materials

2d edition

**Office of the Chairman
1992**

Administrative Conference of the United States

The Administrative Conference of the United States was established by statute as an independent agency of the federal government in 1964. Its purpose is to promote improvements in the efficiency, adequacy, and fairness of procedures by which federal agencies conduct regulatory programs, administer grants and benefits, and perform related governmental functions.

To this end, the Conference conducts research and issues reports concerning various aspects of the administrative process and, when warranted, makes recommendations to the President, Congress, particular departments and agencies, and the judiciary concerning the need for procedural reforms. Implementation of Conference recommendations may be accomplished by direct action on the part of the affected agencies or through legislative changes.

FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK:
Statutes and Related Materials
2d edition

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FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK

Statutes and Related Materials

2d edition

Administrative Conference of the United States
Office of the Chairman
1992

Charles Pou, Jr.
Project Director

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Chairman's Foreword

I am pleased to introduce the second edition of the Conference's *Federal Administrative Procedure Sourcebook.* The *Sourcebook* is one of a series of reference volumes that the Conference has compiled since 1985. This revision reflects dozens of statutory and regulatory changes since the first edition was published.

The laws added to this volume reflect major recent trends in our legal system and American society. On the one hand, the Program Fraud Civil Remedies Act is intended to deter contractor fraud and similar misconduct. This Act reflects (among other things) the growing influence of inspectors general, auditors, and administrative agency decisions. It also suggests how some critical, ongoing government/private sector relationships have become subject to ever closer scrutiny. On the other hand, the Administrative Dispute Resolution Act and Negotiated Rulemaking Act—both enacted in 1990 with the support of the Conference—seek to improve decisionmaking by placing increased decisional responsibility in the hands of those members of the public likely to be affected by agency decisions. At the same time, these new statutes encourage federal agencies to employ simpler, less costly and time-consuming processes in resolving administrative disputes. Agencies' use of mediation and arbitration is part of a current in courts and elsewhere to channel a variety of conflicts into less adversarial processes. The Administrative Conference continues to work with agencies of the federal government to change them into exemplars for the rest of society in handling conflicts more constructively. Recent history, both domestic and international, signifies the importance of this trend for our nation.

Developments since the 1985 *Sourcebook* emphasize the continuing merit of the reflections of James Madison in *The Federalist, No. 51*, as quoted in the first edition by former Chairman Loren A. Smith. The tension inherent in simultaneously controlling the governed and obliging the government to control itself endures. The fact that there are more rules, more laws, more lawyers, and more contention than ever before, does not mitigate Judge Smith's admonition that it is of fundamental importance for us all to understand the laws by which our society functions, their purposes, and their effects upon both government and those governed. In the Conference's *Sourcebook* we have tried to provide access to and explanations of many of the laws applicable to federal agency officials.

The *Sourcebook* is intended for several audiences. Our primary audience, as per the Conference's statutory mandate, comprises agency administrators, attorneys, and other federal employees. Thus, federal administrators wishing a concise description of a particular statute's operation and effect may refer to the Overview section. Agency officials and their attorneys may benefit at other times from a desk book compiling the major laws and related guidance affecting their operations (apart from authorizing and budgetary statutes, of course). In addition, we hope that reviewing judges, scholars, congressional staffs, private attorneys, and others performing research in administrative law or public administration will find convenient starting points in the *Sourcebook*'s Overview, Legislative History, and Bibliography sections.

I hope you will find our offering a helpful one.

Robert S. Ross, Jr.
Acting Chairman
August 1992

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"What a charming life that was, that dear old life in the Navy when I kept grocery on a gunboat. I knew all the regulations and the rest of them didn't. I had all my rights and most of theirs."

Thomas B. Reed (R. Me.)
Speaker of the House, 1890-92, 1895-99

Introduction

The second edition of the *Federal Administrative Procedure Sourcebook* has been compiled by the Office of the Chairman of the Administrative Conference as a basic introduction and reference book on the major federal procedural statutes. The text of each statute is given, along with explanatory material, legislative history, related documents, sources of additional relevant materials, and a bibliography.

The *Sourcebook* is designed to be useful for both lawyers and nonlawyers at federal agencies and for any person who needs to know what any of the key federal procedural statutes is about. While this volume is designed to be a convenient source of statutory and other materials, we emphasize that the commentary is not intended to be a substitute for legal research or for legal counsel. Readers with specific legal questions may have to consult the statute directly, as well as judicial opinions, legislative history, or where appropriate, the lead agency or their own attorney.

Though the *Sourcebook's* organization is largely self-evident, a few preliminary comments are necessary. These notes follow the format of each chapter:

Statutory Citations. This section includes U.S. Code, Public Law and Statutes at Large citations, including all significant amendments.

Lead Agency. This designation is a loose one, because a "lead" agency's role may vary from informal consulting and data collection to issuance of binding regulations, from occasional technical guidance to regular oversight of specific activities. The Overview section typically elaborates on the lead agency's role.

Overview. This section summarizes the content of the statute and its applicability. Any observations or conclusions represent only the judgment of attorneys in the Office of the Chairman of the Administrative Conference.

Bibliography. Lists presented are not intended to be exhaustive, though we have tried to include the major works and some useful references in the Bibliography or accompanying Source Note. Suggestions for additional listing are welcome.

Citations to Administrative Conference Materials. All Conference recommendations, the reports relating to them, and other materials are published in the *Reports and Recommendations of the Administrative Conference* series (cited as ______ ACUS ______ in the Bibliography (e.g., 1980 ACUS 313 or 2 ACUS 119). This series appears as four multi-year compilations from 1968-77, and annually thereafter. Conference recommendations are compiled annually in volume one of the Code of Federal Regulations. Finally, a complete bibliography of Administrative Conference reports appears periodically in the Administrative Law Review (see Chapter 1, Bibliography).

Statutory Texts. The texts are taken from the United States Code and reflect all amendments through August 1992. Notes, cross-references, and the like have generally not been included except where particularly useful.

Future Supplements or Updates. A postcard is attached to the back cover for those interested in receiving future supplements or updates to the *Sourcebook.*

Acknowledgments

As with the first edition, virtually the entire Office of the Chairman has been involved in this project. The primary work came from the attorneys who contributed new or revised and expanded chapters to the second edition of the *Sourcebook.* These are Michael W. Bowers (Ethics in Government Act and FOIA), Gary J. Edles (Judicial Review), Mary Candace Fowler (EAJA and Regulatory Flexibility Act), Kevin L. Jessar (Claims and Debt Collection Acts), Jeffrey S. Lubbers (NEPA), Nancy G. Miller (Paperwork Reduction and Program Fraud Civil Remedies Acts), Brian C. Murphy (FACA and Sunshine Act), David M. Pritzker (Agency Practice and Negotiated Rulemaking Acts), and William J. Olmstead (Privacy Act). Mr. Jessar rendered especially invaluable assistance to the book's publication. Eva Loser's attention to detail in the final stages added much to the publication. Sharon Anderson, Susan Mack, Demetra Matsis, and Karyn Zaayenga typed numerous drafts and offered other varieties of assistance too numerous to mention. Charlene Young's photocopying and Clarice Brown's many contributions helped make the project run smoothly.

In addition, almost two dozen experts from lead agencies, academia, and elsewhere reviewed draft chapters. They provided many helpful comments, and called our attention to numerous inaccuracies. Undoubtedly some errors remain, for which the staff assumes responsibility. Finally, thanks to the House of Representatives Office of the Law Revision Counsel for their help in providing computer disks containing U.S. Code sections.

The Office of the Chairman hopes these combined efforts will promote greater understanding of the administrative process by those who work in, or deal with, federal agencies.

Charles Pou, Jr.
Project Director

Renée Barnow
Publications Editor

Administrative Procedure Act

Citations:

5 U.S.C. §§551-559, 701-706, 1305, 3105, 3344, 5372, 7521; originally enacted June 11, 1946 by Pub. L. No. 404, 60 Stat. 237, Ch. 324, §§1-12.

The Administrative Procedure Act (APA), as originally enacted, was repealed by Pub. L. No. 89-554, 80 Stat. 381 (September 6, 1966), as part of the general revision of title 5 of the United States Code. Its provisions were incorporated into the sections of title 5 listed above. Although the original section numbers are used sometimes, in this volume all references to the Act are to sections of title 5.

Section 552 has been revised significantly and is commonly known as the "Freedom of Information Act." Sections 552, 552a (the "Privacy Act"), 552b (the "Government in the Sunshine Act"), and sections 701-706 pertaining to judicial review are discussed and set forth separately. Two significant amendments to the rulemaking and adjudication procedures of the APA were two laws enacted in 1990--the Administrative Dispute Resolution Act and the Negotiated Rulemaking Act; they too are discussed separately, though briefly summarized herein.

Overview:

Attempts to regularize federal administrative procedures go back at least to the 1930s. Early in 1939, at the suggestion of the attorney general, President Roosevelt asked the attorney general to appoint a distinguished committee to study existing administrative procedures and to formulate recommendations. The Attorney General's Committee on Administrative Procedure, chaired by Dean Acheson, produced a series of monographs on agency functions, and submitted its Final Report to the President and the

Congress in 1941. These materials, plus extensive hearings held before a subcommittee of the Senate Committee on the Judiciary in 1941, are primary historical sources for the Administrative Procedure Act.

The Administrative Procedure Act was signed into law by President Truman on June 11, 1946. In the months that followed, the Department of Justice compiled a manual of advice and interpretation of its various provisions. The *Attorney General's Manual on the Administrative Procedure Act,* published in 1947 (and reprinted in the Appendix), remains the principal guide to the structure and intent of the APA. The *Manual* (page 9) states the purposes of the Act as follows:

(1) To require agencies to keep the public currently informed of their organization, procedures and rules.

(2) To provide for public participation in the rulemaking process.

(3) To prescribe uniform standards for the conduct of formal rulemaking and adjudicatory proceedings (i.e., proceedings required by statute to be made on the record after opportunity for an agency hearing).

(4) To restate the law of judicial review.

The Act imposes upon agencies certain procedural requirements for two modes of agency decisionmaking: rulemaking and adjudication. In general, the term "agency" refers to any authority of the government of the United States, whether or not it is within, or subject to review by, another agency--but excluding the Congress, the courts, and the governments of territories, possessions, or the District of Columbia.[1] Definitions of other terms may be found in section 551.

Structure of the Administrative Procedure Act. The Administrative Procedure Act has two major subdivisions: sections 551 through 559, dealing in general with agency procedures; and sections 701 through 706, dealing in general with judicial review. In addition, several sections dealing with administrative law judges (§§1305, 3105, 3344, 5372, and 7521) are scattered through title 5 of the United States Code. The sections pertaining to judicial review are discussed in Chapter 2 of this volume. As noted, sections 552, 552a, and 552b are also discussed in separate chapters, as are the new sections added by the Administrative Dispute Resolution and Negotiated Rulemaking Acts.

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[1] See 5 U.S.C. §§551(1), 701(b)(1) for other specific exemptions.

The structure of the APA is shaped around the distinction between rulemaking and adjudication, with different sets of procedural requirements prescribed for each. *Rulemaking* is agency action that regulates the future conduct of persons, through formulation and issuance of an agency statement designed to implement, interpret, or prescribe law or policy. It is essentially legislative in nature because of its future general applicability and its concern for policy considerations. By contrast, *adjudication* is concerned with determination of past and present rights and liabilities. The result of an adjudicative proceeding is the issuance of an "order." (Licensing decisions are considered to be adjudication.)

The line separating these two modes of agency action is not always a clear one, because agencies engage in a great variety of actions. Most agencies use rulemaking to formulate future policy, though there is no bar to announcing policy statements in adjudicatory orders. Agencies normally use a combination of rulemaking and adjudication to effectuate their programs. The APA definition of a "rule," somewhat confusingly, speaks of an "agency statement of general or particular applicability and future effect. . . ." The words "or particular" were apparently included in the definition to encompass such actions as the setting of rates or the approval of corporate reorganizations, to be carried out under the relatively flexible procedures governing rulemaking.[2]

Beyond the distinction between rulemaking and adjudication, the APA subdivides each of these categories of agency action into *formal and informal proceedings*. Whether a particular rulemaking or adjudication proceeding is considered to be "formal" depends on whether the proceeding is required by statute to be "on the record after opportunity for an agency hearing" (5 U.S.C. §§553(c), 554(a)). The Act prescribes elaborate procedures for both formal rulemaking and formal adjudication, and relatively minimal procedures for informal rulemaking. Virtually no procedures are prescribed by the APA for the remaining category of informal adjudication, which is by far the most prevalent form of governmental action.[3]

---

[2] For discussion of the inclusion of "or particular" in the definition, see K. Davis, 2 *Administrative Law Treatise* §7:3 (2d ed. 1978); Morgan, *Toward a Revised Strategy for Ratemaking*, 78 U. Ill. L.F. 21, 50 n.143 (1978).

[3] See P. Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. Chi. L. Rev. 739 (1976), for a discussion of informal adjudication.

Rulemaking. Section 553 sets forth the basic requirements for *rulemaking:* notice of proposed rulemaking in the Federal Register, followed by an opportunity for some level of participation by interested persons, and finally publication of the rule, in most instances at least 30 days before it becomes effective. For a detailed discussion of rulemaking procedures, see *A Guide to Federal Agency Rulemaking,* published by the Administrative Conference (2d ed. 1991).

Excluded from the coverage of the Act are rulemaking involving military or foreign affairs functions and matters relating to agency management or personnel, public property, loans, grants, benefits, or contracts. These exceptions to the Act's general policy of providing an opportunity for public participation in rulemaking, to foster the fair and informed exercise of agency authority, are "narrowly construed and only reluctantly countenanced."[4] They are neither mandatory nor intended to discourage agencies from using public participation procedures. On the contrary, when Congress enacted the APA, it encouraged agencies to use the notice-and-comment procedure in some excepted cases, and many agencies routinely do so in making certain kinds of exempted rules. The Conference has encouraged this trend, and has called on Congress to eliminate or narrow several of these exemptions.[5] "Regulatory reform" legislative proposals considered over the years have contained provisions to alter or eliminate several of these exemptions.

Most rulemaking proceedings involve *informal rulemaking,* where all that the APA requires for public participation is an opportunity to submit written data, views, or arguments; oral presentations may also be permitted. The published rule must incorporate a concise general statement of its basis and purpose. Despite the brevity of these requirements, it is important to note that Congress has routinely, through other statutes, added procedural requirements that affect various agency programs. These additional statutory requirements may apply to specific agencies or programs, or may be government-wide (such as the Regulatory Flexibility Act; see Chapter 18). Recent presidents have also imposed additional requirements for rulemaking. (See, e.g., Executive Orders 12,291 and 12,498, which are reprinted in the Appendix.) Though courts have sometimes sought to add procedural requirements, the Supreme Court's decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), has, to a great extent, limited this kind of judicial activity.[6] In *Vermont Yankee,* the Supreme Court held that where rulemaking is governed by the (informal) requirements of section 553, as in the case of the Nuclear Regulatory Commission's regulation of nuclear power plants, the courts may not require additional procedures.

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[4] American Fed'n of Gov't Employees, AFL-CIO v. Block, 655 F.2d 1153, 1156 (D.C. Cir. 1981).

[5] See Conference Recommendations 69-8, 73-5, 79-2, and 82-2, at 1 CFR Part 305 (1990). See generally, the discussion in Administrative Conference of the U.S., *A Guide to Federal Agency Rulemaking* (2d ed. 1991).

The APA also provides for *formal rulemaking*--a procedure employed when rules are required by statute to be made on the record after an opportunity for an agency hearing. Essentially, this procedure requires that the agency issue its rule after the kind of trial-type hearing procedures (§§556, 557) normally reserved for adjudicatory orders (discussed below). The Supreme Court, in *United States v. Florida East Coast Railway Co.*, 410 U.S. 224 (1973), held that such a procedure was required only where the statute involved specifically requires an "on the record" hearing. Because few statutes do so, formal rulemaking is used infrequently.[7] However, numerous agency statutes (often called "hybrid rulemaking" statutes) do require some specific procedures beyond the basic notice-and-comment elements of informal rulemaking.

Negotiated Rulemaking. The Negotiated Rulemaking Act of 1990, discussed in greater detail in Chapter 14, establishes a statutory framework for the conduct of negotiated rulemaking, a procedure developed in large part through the Conference's research. A number of agencies have successfully completed negotiated rules in the past several years and the Act's provisions reflect that experience. As with other "alternative means of dispute resolution" (ADR),[8] negotiated rulemaking provides a means of using consensual techniques to produce better, more acceptable results, reducing the likelihood of protracted litigation.

The Negotiated Rulemaking Act clearly establishes regulatory agencies' authority to use such consensual techniques as negotiated rulemaking without limiting agency innovation. The Act identifies criteria for the discretionary determination by agency heads of whether and when to use negotiated rulemaking. It also sets forth basic requirements for public notice and the conduct of meetings under the Federal Advisory Committee Act.

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[6] For a contrary view, see K. Davis, *Administrative Law Treatise*, §§6:37-6:37-3 (1982 Supp.).

[7] See, e.g., 21 U.S.C. §371(e)(3) (issuance of standards under the Federal Food, Drug, and Cosmetic Act). In U.S. v. Florida East Coast Railway Co., 410 U.S. 224 (1973), a statutory requirement of a decision "after hearing" was held insufficient to make sections 556 and 557 applicable (setting of rates under the Interstate Commerce Act).

[8] See discussion of the Administrative Dispute Resolution Act in Chapter 3.

Adjudication. Sections 554, 556, and 557 apply to *formal adjudication* (i.e., to cases for which an adjudicatory proceeding is required by statute to be determined on the record after opportunity for an agency hearing).[9] These sections apply, for example, to proceedings by certain agencies seeking to impose civil money penalties as part of a regulatory enforcement program.[10]

Section 554(a) specifically exempts six types of proceedings from the requirements of these sections: matters subject to a subsequent *de novo* trial in court; certain personnel matters other than for administrative law judges; decisions based solely on inspections, tests, or elections; military or foreign affairs functions; cases where an agency acts as agent for a court; and certification of worker representatives. Section 554(b) specifies notice requirements. Section 554(c) provides for an opportunity for informal settlements where practicable. Section 554(d) forbids presiding officers from engaging in *ex parte* (off-the-record) consultations on facts at issue in the case. The subsection also addresses "separation of functions," by restricting agency employees engaged in investigation or prosecution of a case from supervising the presiding officer or participating or advising in the decision in that or a factually related case (with certain exceptions). Section 554(e) authorizes agencies, in their discretion, to issue declaratory orders that would terminate a controversy or remove uncertainty with respect to matters required by statute to be determined on the record after opportunity for a hearing.

Sections 556 and 557 prescribe the specific procedures to be used in formal adjudication.[11] In brief, a trial-type hearing must be held, conducted either by some or all of the members of the agency or by an administrative law judge (appointed under 5 U.S.C. §3105). An administrative law judge (ALJ) is normally the presiding officer in formal adjudication. The APA (§556(c)) spells out the powers and duties of ALJs (formerly called "hearing examiners"). It also provides for the independence of ALJs by protecting their tenure (5 U.S.C. §7521) and pay (5 U.S.C. §5372), and prohibiting inconsistent duties (5 U.S.C. §3105). In addition, under 5 U.S.C. §1305, the Office of Personnel Management has prescribed a special selection procedure for appointment of ALJs. Currently, there are more than 1100 ALJs in the federal government.

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[9] See Chapter 7 for a discussion of the Equal Access to Justice Act, which allows certain parties who prevail over the government in formal adjudicatory proceedings (other than licensing and ratemaking) to recover attorneys' fees and expenses.

[10] See, e.g., 12 U.S.C. §§504, 505 (banking); 42 U.S.C. §1320a-7a (Medicare fraud); 16 U.S.C. §1858 (fishery conservation).

[11] Note that sections 554, 556, and 557 contain some special, more flexible, procedures for cases involving initial licensing and rulemaking.

Section 556 also covers disqualification of presiding officers, burden of proof, and parties' rights to cross examination. It provides that the transcript of testimony and exhibits, together with all documents filed in the proceeding, constitutes the exclusive record for decision.

Section 557 provides that when, as is usually the case, a hearing is not conducted by the agency itself, the presiding officer (normally an ALJ) must issue an initial decision--unless the agency requires the entire record be certified to the agency for decision. An initial decision automatically becomes the agency's decision unless appealed or reviewed on motion of the agency. Section 557 provides, in general, an opportunity for parties to submit for consideration their own proposed findings and conclusions, or exceptions to decisions. The record must show the ruling on each finding, conclusion, or exception presented.

Section 557(d) was added to the APA by the Government in the Sunshine Act in 1976 (see Chapter 12) to prohibit *ex parte* communications relevant to the merits of a pending formal agency proceeding. However, where *ex parte* communications do take place, their content must be placed on the public record, and the presiding officer may require the party to show cause why a decision should not be made adversely affecting the party's interest.[12] Most agencies have adopted procedures applicable to hearings relative to agency programs. (A list of citations appears at the end of the chapter.) *Manual for Administrative Law Judges* (rev. ed. 1982), contains a detailed discussion of procedures for the conduct of hearings and a collection of model forms.

Alternative Means of Dispute Resolution. The Administrative Dispute Resolution Act specifically provides agencies the authority to employ mediation, arbitration, and other consensual methods of dispute resolution in resolving cases under the APA and in other kinds of agency disputes. The legislation specifically establishes a federal policy encouraging ADR in place of more costly, time consuming adjudication. While no agency is forced to use ADR techniques, the legislation requires each agency head to undertake a review of typical agency litigation and administrative disputes to assess where ADR techniques will be useful. The Act is discussed in greater detail in Chapter 3.

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[12] While the APA does not forbid *ex parte* contacts in informal rulemaking, the Conference has recommended agency practices for making the public aware of most of those that do occur. See Conference Recommendations 77-3 and 80-6, at 1 CFR Part 305 (1992); Administrative Conference of the U.S., *A Guide to Federal Agency Rulemaking* (2d ed. 1991).

Miscellaneous Provisions. Section 555 states various procedural rights of private parties, which may be incidental to rulemaking, adjudication, or the exercise of any other agency authority. Section 555(b) addresses appearances in agency proceedings by parties, counsel, and other interested persons. Section 555(c) provides that a person compelled to submit data or evidence is entitled to a copy or transcript, except that in nonpublic investigations this may be limited to a right to inspect the official transcript. Additional provisions of section 555 relate to subpoenas and to the requirement of prompt notice of denials of applications, petitions, or other requests made to agencies.

Section 558 is a rarely invoked section of the APA. Section 558(b) makes clear the requirement that agency rules, orders, and sanctions be within the jurisdiction delegated to the agency and otherwise authorized by law. Section 558(c) contains some special notice provisions and other procedural requirements for handling applications, suspensions, revocations, or license renewals.

Legislative History:[13]

The legislative history of the Administrative Procedure Act begins with the Final Report of the Attorney General's Committee on Administrative Procedure in 1941. This report led to the introduction in Congress of the so-called majority and minority bills, respectively designated as S. 675 and S. 674, 77th Cong., 1st Sess. These bills, together with S. 918, formed the basis for extensive hearings held in 1941 before a subcommittee of the Senate Committee on the Judiciary. In 1945, the House Committee on the Judiciary held brief hearings on various administrative procedure bills, of which H.R. 1203, 79th Cong., 1st Sess., was the precursor of the Act as passed. Also in June 1945, the Senate Committee on the Judiciary issued a comparative print, with comments, which is an essential part of the legislative history. The committee reports on the Act are Sen. Rep. No. 752, 79th Cong., 1st Sess. and H.R. Rep. No. 1980, 79th Cong., 2d Sess. In October 1945, the attorney general, at the request of the Senate Committee on the Judiciary, submitted a letter, with memorandum attached, setting forth the understanding of the Department of Justice as to the purpose and meaning of the various provisions of the bill (S. 7). This letter and memorandum constitute Appendix B of the Senate Committee Report and also appear as an appendix in the *Attorney General's Manual.*

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[13] The summary of legislative history is taken from the Attorney General's Manual, p. 8.

Source Note:

The Senate and House debates plus the documents mentioned in the preceding paragraph, other than the Final Report of the Attorney General's Committee, are compiled in S. Doc. No. 248, 79th Cong., 2d Sess. (1946), entitled *Administrative Procedure Act--Legislative History 1944-46.* The Final Report was published as S. Doc. No. 8, 77th Cong., 1st Sess. (1941). The *Attorney General's Manual on the Administrative Procedure Act* (1947) is a contemporaneous interpretive guide to the original language of the Act (see Appendix).

Individual agencies have adopted, within the framework of the APA, procedural rules for the conduct of rulemaking and adjudication. A list of citations to these rules appears below.

The Conference's comprehensive *Guide to Federal Agency Rulemaking* (2d ed. 1991) discusses the entire rulemaking process. The *Guide* contains an extensive bibliography. The Conference has also published a *Manual for Administrative Law Judges* (rev. ed. 1982). The *Manual*, now under revision, is a handbook of practice in the conduct of hearings. (These volumes are available from the Government Printing Office.) Persons interested in negotiated rulemaking or ADR in APA adjudication should consult the separate ACUS *Sourcebooks* on these subjects and the other materials listed in the Bibliography sections of Chapters 3 and 14. The Conference's *Directory of Administrative Hearing Facilities* (1984) lists courtrooms and other locations in each state where agency hearings may be held. (Single copies of the *Directory* are available from the Conference.)

The Conference has sponsored numerous studies of rulemaking and adjudication procedures, and has recommended various improvements in agency practice. A complete list of its recommendations appears in volume 1 of the Code of Federal Regulations; a bibliography of publications by and reports to the Conference appeared in the Administrative Law Review (1987) (see Bibliography).

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1. *Administrative Procedure Act--Legislative History 1944-46*, S. Doc. No. 248, 79th Cong., 2d Sess. (1946).

2. *Administrative Procedure in Government Agencies*, S. Doc. No. 8, 77th Cong., 1st Sess. (1941) (Final Report of the Attorney General's Committee on Administrative Procedure).

3. House of Representatives Committee on the Judiciary, *Report on S.7*, H.R. Rep. No. 1980, 79th Cong., 2d Sess. (1946), *reprinted in* S. Doc. No. 248 (item 1, above) and in Pike and Fischer Administrative Law (2d), Desk Book Stat. - 51.

4. Senate Committee on the Judiciary, *Report on S.7*, Rep. No. 752, 79th Cong., 1st Sess. (1945), *reprinted in* S. Doc. No. 248 (item 1, above) and in Pike and Fischer Administrative Law (2d), Desk Book, Stat.-11.

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2. Administrative Conference of the U.S., *Directory of Administrative Hearing Facilities* (1984).

3. Administrative Conference of the U.S., various recommendations and statements, 1 CFR Parts 305, 310:

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68-5	Representation of the Poor in Agency Rulemaking of Direct Consequence to Them
68-6	Delegation of Final Decisional Authority Subject to Discretionary Review by the Agency
69-8	Elimination of Certain Exemptions from the APA Rulemaking Requirements

70-3	Summary Decision in Agency Adjudication
70-4	Discovery in Agency Adjudication
71-1	Interlocutory Appeal Procedures
71-3	Articulation of Agency Policies
71-6	Public Participation in Administrative Hearings
72-1	Broadcast of Agency Proceedings
72-5	Procedures for the Adoption of Rules of General Applicability
73-5	Elimination of the "Military or Foreign Affairs Function" Exemption from APA Rulemaking Requirements
73-6	Procedures for Resolution of Environmental Issues in Licensing Proceedings
74-1	Subpoena Power in Formal Rulemaking and Formal Adjudication
76-2	Strengthening the Informational and Notice-Giving Functions of the "Federal Register"
76-3	Procedures in Addition to Notice and the Opportunity for Comment in Informal Rulemaking
76-5	Interpretive Rules of General Applicability and Statements of General Policy
77-3	Ex parte Communications in Informal Rulemaking Proceedings
78-3	Time Limits on Agency Actions
79-1	Hybrid Rulemaking Procedures of the Federal Trade Commission
79-4	Public Disclosure Concerning the Use of Cost-Benefit and Similar Analyses in Regulation
80-4	Decisional Officials' Participation in Rulemaking Proceedings
80-6	Intragovernmental Communications in Informal Rulemaking Proceedings
82-4	Procedures for Negotiating Proposed Regulations
83-2	The "Good Cause" Exemption from APA Rulemaking Requirements
83-3	Agency Structures for Review of Decisions of Presiding Officers under the Administrative Procedure Act
85-2	Agency Procedures for Performing Regulatory Analysis of Rules
85-5	Procedures for Negotiating Proposed Regulations
86-2	Use of Federal Rules of Evidence in Federal Agency Adjudications

86-6	Petitions for Rulemaking
87-1	Priority Setting and Management of Rulemaking by the Occupational Safety and Health Administration
88-7	Valuation of Human Life in Regulatory Decisionmaking
88-9	Presidential Review of Agency Rulemaking
90-8	Rulemaking and Policymaking in the Medicaid Program
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§310.9	Statement on Guidelines for Choosing the Appropriate Level of Agency Policy Articulation

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Commerce	
International Trade Administration	15 CFR Part 354
National Oceanic and Atmospheric Administration	15 CFR Part 904
Commodity Futures Trading Commission	17 CFR Parts 10, 12,13
Consumer Product Safety Commission	16 CFR Parts 1025, 1051, 1052
Environmental Protection Agency	40 CFR Parts 22, 25, Parts 104, 108, §124.71, Parts 164, 209
Federal Communications Commission	47 CFR Part 1
Federal Deposit Insurance Corporation	12 CFR Part 308
Federal Emergency Management Agency	44 CFR Parts 1, 68
Federal Energy Regulatory Commission	18 CFR Part 385
Federal Labor Relations Authority	5 CFR Parts 2422, 2423
Federal Maritime Commission	46 CFR Part 502
Federal Mine Safety and Health Review Commission	29 CFR Part 2700
Federal Reserve Board	12 CFR Parts 262, 263
Federal Trade Commission	16 CFR §§1.7-.26, Part 3, §4.7
Food and Drug Administration (HHS)	21 CFR

	Parts 10, 12, 16
Housing and Urban Development	24 CFR Parts 26, 1720,§3282.152
Interior	43 CFR Part 4; 50 CFR Part 11
International Trade Commission	19 CFR Part 210
Interstate Commerce Commission	49 CFR Parts 1100 - 1118
Justice	
Drug Enforcement Administration	21 CFR §§1301.51-.57, §§1303.31-37, §§1311.51-.53, §§1312.41-.47, §§98.310-.314, Part 580; 41 CFR Part 50-203 Part 1316
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National Labor Relations Board	29 CFR Parts 101, 102
National Transportation Safety Board	49 CFR Part 821
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Social Security Administration (HHS)	20 CFR §§404.900-.996, §§410.601-.707, §§416.1400-.1494; 42 CFR §§405.701-.750, §§405.801-.872, §§405.1801-.1889
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Treasury	
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Comptroller of the Currency	12 CFR Part 19
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NOTE: Several of the above agencies, as well as other agencies with financial assistance programs, have published rules of practice for formal (ALJ) hearings to effectuate title VI of the Civil Rights Act, which guarantees nondiscrimination in such programs. Citations for these rules can be found in the CFR Index under the heading "civil rights."

Appendix:

1. Administrative Procedure Act, 5 U.S.C. §§551, 553-59, 701-06, 1305, 3105, 3344, 5372, 7521.
2. Executive Order 12,291, 3 CFR 127 (1982), *reprinted in* 5 U.S.C. §601 note (1982).
3. Executive Order 12,498, 3 CFR 323 (1985), *reprinted in* 5 U.S.C. §601 note (1988).

4. President's Memorandum for the Heads of Executive Departments and Agencies, 21 Weekly Comp. Pres. Doc. 13 (Jan. 7, 1985).

5. Office of Management and Budget, Regulatory Impact Analysis Guidance, *Regulatory Program of the United States Government-1990* 653 (1990).

6. Office of Management and Budget, Memorandum for the Heads of Departments and Agencies, Presidential Review of Agency Rulemaking (April 3, 1989).

7. U.S. Department of Justice, *Attorney General's Manual on the Administrative Procedure Act* (1947).

Administrative Procedure Act

Title 5, U.S. Code

Chapter 5-Administrative Procedure

§551. Definitions.
§552. Public information; agency rules, opinions, orders, records, and proceedings.
§552a. Records about individuals.[1]
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§554. Adjudications.
§555. Ancillary matters.
§556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision.
§557.Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record.
§558. Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses.
§559. Effect on other laws; effect of subsequent statute.

* * * *

§551. Definitions

For the purpose of this subchapter---

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include---

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia; or except as to the requirements of section 552 of this title;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

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[1] So in original. Does not conform to section catchline.

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix;

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) "party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10) "sanction" includes the whole or a part of an agency---

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action;

(11) "relief" includes the whole or a part of an agency---

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person;

(12) "agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section;

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and

(14) "ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter.
(Pub. L. No. 89-554, Sept. 6, 1966, 80 Stat. 381; Pub. L. No. 94-409, §4(b), Sept. 13, 1976, 90 Stat. 1247.)

* * * *

§553. Rulemaking

(a) This section applies, according to the provisions thereof, except to the extent that there is involved---

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include---

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply-

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except---

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.
(Pub. L. No. 89-554, Sept. 6, 1966, 80 Stat. 383.)

§554. Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved-

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a[2] administrative law judge appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for—

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not---

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

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[2] So in original.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

(Pub. L. No. 89-554, Sept. 6, 1966, 80 Stat. 384; Pub. L. No. 95-251, §2(a)(1), Mar. 27, 1978, 92 Stat. 183.)

§555. Ancillary matters

(a) This section applies, according to the provisions thereof, except as otherwise provided by this subchapter.

(b) A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding. So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function. With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it. This subsection does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding.

(c) Process, requirement of a report, inspection, or other investigative act or demand may not be issued, made, or enforced except as authorized by law. A person compelled to submit data or evidence is entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

(d) Agency subpenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought. On contest, the court shall sustain the subpena or similar process or demand to the extent that it is found to be in accordance with law. In a proceeding for enforcement, the court shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

(e) Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection

with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.
(Pub. L. No. 89-554, Sept. 6, 1966, 80 Stat. 385.)

§556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more administrative law judges appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—

(1) administer oaths and affirmations;

(2) issue subpenas authorized by law;

(3) rule on offers of proof and receive relevant evidence;

(4) take depositions or have depositions taken when the ends of justice would be served;

(5) regulate the course of the hearing;

(6) hold conferences for the settlement or simplification of the issues by consent of the parties or by the use of alternative means of dispute resolution as provided in subchapter IV of this chapter;

(7) inform the parties as to the availability of one or more alternative means of dispute resolution, and encourage use of such methods;

(8) require the attendance at any conference held pursuant to paragraph (6) of at least one representative of each party who has authority to negotiate concerning resolution of issues in controversy;

(9) dispose of procedural requests or similar matters;

(10) make or recommend decisions in accordance with section 557 of this title; and

(11) take other action authorized by agency rule consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

(Pub. L. No. 89-554, Sept. 6, 1966, 80 Stat. 386; Pub. L. No. 94-409, §4(c), Sept. 13, 1976, 90 Stat. 1247; Pub. L. No. 95-251, §2(a)(1), Mar. 27, 1978, 92 Stat. 183; Pub. L. No. 101-552, §4(a), Nov. 15, 1990, 104 Stat. 2737.)

§557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses---

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

(d)(1) In any agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of ex parte matters as authorized by law—

(A) no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding;

(B) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to any interested person outside the agency an ex parte communication relevant to the merits of the proceeding;

(C) a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes or knowingly causes to be made, a communication prohibited by this subsection shall place on the public record of the proceeding:

(i) all such written communications;

(ii) memoranda stating the substance of all such oral communications; and

(iii) all written responses, and memoranda stating the substance of all oral responses, to the materials described in clauses (i) and (ii) of this subparagraph;

(D) upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this subsection, the agency, administrative law judge, or other employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation; and

(E) the prohibitions of this subsection shall apply beginning at such time as the agency may designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge.

(2) This subsection does not constitute authority to withhold information from Congress.

(Pub. L. No. 89-554, Sept. 6, 1966, 80 Stat. 387; Pub. L. No. 94-409, §4(a), Sept. 13, 1976, 90 Stat. 1246.)

§558. Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses

(a) This section applies, according to the provisions thereof, to the exercise of a power or authority.

(b) A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.

(c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given---

(1) notice by the agency in writing of the facts or conduct which may warrant the action; and

(2) opportunity to demonstrate or achieve compliance with all lawful requirements.

When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

(Pub. L. No. 89-554, Sept. 6, 1966, 80 Stat. 388.)

§559. Effect on other laws; effect of subsequent statute

This subchapter, chapter 7, and sections 1305, 3105, 3344, 4301(2)(E), 5372, and 7521 of this title, and the provisions of section 5335(a)(B) of this title that relate to administrative law judges, do not limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, requirements or privileges relating to evidence or procedure apply equally to agencies and persons. Each agency is granted the authority necessary to comply with the requirements of this subchapter through the issuance of rules or otherwise. Subsequent statute may not be held to supersede or modify this subchapter, chapter 7, sections 1305, 3105, 3344, 4301(2)(E), 5372, or 7521 of this title, or the provisions of section 5335(a)(B) of this title that relate to administrative law judges, except to the extent that it does so expressly.

(Pub. L. No. 89-554, Sept. 6, 1966, 80 Stat. 388; Pub. L. No. 90-623, §1(1), Oct. 22, 1968, 82 Stat. 1312; Pub. L. No. 95-251, §2(a)(1), Mar. 27, 1978, 92

Stat. 183; Pub. L. No. 95-454, title VIII, §801(a)(3)(B)(iii), Oct. 13, 1978, 92 Stat. 1221.)

* * * *

Chapter 7–Judicial Review

§701. Application; definitions.
§702. Right of review.
§703. Form and venue of proceeding.
§704. Actions reviewable.
§705. Relief pending review.
§706. Scope of review.

§701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that---

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter---

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include---

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

(Pub. L. No. 89-554, Sept. 6, 1966, 80 Stat. 392.)

§702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an

officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.
(Pub. L. No. 89-554, Sept. 6, 1966, 80 Stat. 392; Pub. L. No. 94-574, §1, Oct. 21, 1976, 90 Stat. 2721.)

§703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.
(Pub. L. No. 89-554, Sept. 6, 1966, 80 Stat. 392; Pub. L. No. 94-574, §1, Oct. 21, 1976, 90 Stat. 2721.)

§704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsiderations, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.
(Pub. L. No. 89-554, Sept. 6, 1966, 80 Stat. 392.)

§705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on

application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.
(Pub. L. No. 89-554, Sept. 6, 1966, 80 Stat. 393.)

§706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall---

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be---

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.
(Pub. L. No. 89-554, Sept. 6, 1966, 80 Stat. 393.)

* * * *

§1305. Administrative law judges

For the purpose of section[3] 3105, 3344, 4301(2)(D), and 5372 of this title and the provisions of section 5335(a)(B) of this title that relate to administrative law judges, the Office of Personnel Management may, and for the purpose of section 7521 of this title, the Merit Systems Protection Board may investigate, require reports by agencies, issue reports, including an annual report to Congress, prescribe regulations, appoint advisory committees as necessary, recommend legislation, subpena witnesses and records, and pay witness fees as established for the courts of the United States.
(Pub. L. No. 89-554, Sept. 6, 1966, 80 Stat. 402; Pub. L. No. 90-83, §1(3), Sept. 11, 1967, 81 Stat. 196; Pub. L. No. 95-251, §2(a)(1), (b)(1), Mar. 27, 1978, 92

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[3] So in original. Probably should be "sections".

Stat. 183; Pub. L. No. 95-454, title VIII, §801(a)(3)(B)(iii), title IX, §906(a)(12), Oct. 13, 1978, 92 Stat. 1221, 1225.)

* * * *

§3105. Appointment of administrative law judges

Each agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title. Administrative law judges shall be assigned to cases in rotation so far as practicable, and may not perform duties inconsistent with their duties and responsibilities as administrative law judges.
(Pub. L. No. 89-554, Sept. 6, 1966, 80 Stat. 415; Pub. L. No. 95-251, §2(a)(1), (b)(2), (d)(1), Mar. 27, 1978, 92 Stat. 183, 184.)

* * * *

§3344. Details; administrative law judges

An agency as defined by section 551 of this title which occasionally or temporarily is insufficiently staffed with administrative law judges appointed under section 3105 of this title may use administrative law judges selected by the Office of Personnel Management from and with the consent of other agencies.
(Pub. L. No. 89-554, Sept. 6, 1966, 80 Stat. 425; Pub. L. No. 95-251, §2(a)(1), (b)(2), Mar. 27, 1978, 92 Stat. 183; Pub. L. No. 95-454, title IX, §906(a)(2), Oct. 13, 1978, 92 Stat. 1224.)

* * * *

§5372. Administrative law judges

(a) For the purposes of this section, the term "administrative law judge" means an administrative law judge appointed under section 3105.

(b)(1) There shall be 3 levels of basic pay for administrative law judges (designated as AL-1, 2, and 3, respectively), and each such judge shall be paid at 1 of those levels, in accordance with the provisions of this section. The rates of basic pay for those levels shall be as follows:

AL-3, rate A 65 percent of the rate of basic pay for level IV of the Executive Schedule.

AL-3, rate B 70 percent of the rate of basic pay for level IV of the Executive Schedule.

AL-3, rate C 75 percent of the rate of basic pay for level IV of the Executive Schedule.

AL-3, rate D 80 percent of the rate of basic pay for level IV of the Executive Schedule.

AL-3, rate E 85 percent of the rate of basic pay for level IV of the Executive Schedule.

AL-3, rate F 90 percent of the rate of basic pay for level IV of the Executive Schedule.

AL-2 95 percent of the rate of basic pay for level IV of the Executive Schedule.

AL-1 The rate of basic pay for level IV of the Executive Schedule.

(2) The Office of Personnel Management shall determine, in accordance with procedures which the Office shall by regulation prescribe, the level in which each administrative-law-judge position shall be placed and the qualifications to be required for appointment to each level.

(3)(A) Upon appointment to a position in AL-3, an administrative law judge shall be paid at rate A of AL-3, and shall be advanced successively to rates B, C, and D of that level upon completion of 52 weeks of service in the next lower rate, and to rates E and F of that level upon completion of 104 weeks of service in the next lower rate.

(B) The Office of Personnel Management may provide for appointment of an administrative law judge in AL-3 at an advanced rate under such circumstances as the Office may determine appropriate.

(c) The Office of Personnel Management shall,[4] prescribe regulations necessary to administer this section.

(Pub. L. No. 89-554, Sept. 6, 1966, 80 Stat. 473, §5362; Pub. L. No. 95-251, §2(a)(1), (b)(1), Mar. 27, 1978, 92 Stat. 183; renumbered §5372 and amended Pub. L. No. 95-454, title VIII, §801(a)(3)(A)(ii), title IX, §906(a)(2), Oct. 13, 1978, 92 Stat. 1221, 1224; Pub. L. No. 101-509, title V, §529 [title I, §104(a)(1)], Nov. 5, 1990, 104 Stat. 1427, 1445.)

AMENDMENTS

1990 Pub. L. No. 101-509 amended section generally. Prior to amendment, section read as follows: "Administrative law judges appointed under section 3105 of this title are entitled to pay prescribed by the Office of Personnel Management independently of agency recommendations or ratings and in accordance with subchapter III of this chapter and chapter 51 of this title."

* * * *

§7521. Actions against administrative law judges

(a) An action may be taken against an administrative law judge appointed under section 3105 of this title by the agency in which the administrative law judge is employed only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board.

(b) The actions covered by this section are---

(1) a removal;

(2) a suspension;

(3) a reduction in grade;

(4) a reduction in pay; and

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[4] So in original. The comma probably should not appear.

(5) a furlough of 30 days or less;

but do not include---

(A) a suspension or removal under section 7532 of this title;

(B) a reduction-in-force action under section 3502 of this title; or

(C) any action initiated under section 1215 of this title.

(Added Pub. L. No. 95-454, title II, §204(a), Oct. 13, 1978, 92 Stat. 1137, and amended Pub. L. No. 101-12, §9(a)(2), Apr. 10, 1989, 103 Stat. 35.)

Executive Order 12,291
FEDERAL REGULATION
3 CFR 127 (1981 Compilation)

Executive Order 12291 of February 17, 1981

Federal Regulation

By the authority vested in me as President by the Constitution and laws of the United States of America, and in order to reduce the burdens of existing and future regulations, increase agency accountability for regulatory actions, provide for presidential oversight of the regulatory process, minimize duplication and conflict of regulations, and insure well-reasoned regulations, it is hereby ordered as follows:

Section 1. *Definitions.* For the purposes of this Order:

(a) "Regulation" or "rule" means an agency statement of general applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the procedure or practice requirements of an agency, but does not include:

(1) Administrative actions governed by the provisions of Sections 556 and 557 of Title 5 of the United States Code;

(2) Regulations issued with respect to a military or foreign affairs function of the United States; or

(3) Regulations related to agency organization, management, or personnel.

(b) "Major rule" means any regulation that is likely to result in:

(1) An annual effect on the economy of $100 million or more;

(2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or

(3) Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

(c) "Director" means the Director of the Office of Management and Budget.

(d) "Agency" means any authority of the United States that is an "agency" under 44 U.S.C. 3502(1), excluding those agencies specified in 44 U.S.C. 3502(10).

(e) "Task Force" means the Presidential Task Force on Regulatory Relief.

Sec. 2. *General Requirements.* In promulgating new regulations, reviewing existing regulations, and developing legislative proposals concerning regulation, all agencies, to the extent permitted by law, shall adhere to the following requirements:

(a) Administrative decisions shall be based on adequate information concerning the need for and consequences of proposed government action;

(b) Regulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society;

(c) Regulatory objectives shall be chosen to maximize the net benefits to society;

(d) Among alternative approaches to any given regulatory objective, the alternative involving the least net cost to society shall be chosen; and

(e) Agencies shall set regulatory priorities with the aim of maximizing the aggregate net benefits to society, taking into account the condition of the particular industries affected by regulations, the condition of the national economy, and other regulatory actions contemplated for the future.

Sec. 3. *Regulatory Impact Analysis and Review.*

(a) In order to implement Section 2 of this Order, each agency shall, in connection with every major rule, prepare, and to the extent permitted by law consider, a Regulatory Impact Analysis. Such Analyses may be combined with any Regulatory Flexibility Analyses performed under 5 U.S.C. 603 and 604.

(b) Each agency shall initially determine whether a rule it intends to propose or to issue is a major rule, *provided that,* the Director, subject to the direction of the Task Force, shall have authority, in accordance with Sections 1(b) and 2 of this Order, to prescribe criteria for making such determinations, to order a rule to be treated as a major rule, and to require any set of related rules to be considered together as a major rule.

(c) Except as provided in Section 8 of this Order, agencies shall prepare Regulatory Impact Analyses of major rules and transmit them, along with all notices of proposed rulemaking and all final rules, to the Director as follows:

(1) If no notice of proposed rulemaking is to be published for a proposed major rule that is not an emergency rule, the agency shall prepare only a final Regulatory Impact Analysis, which shall be transmitted, along with the proposed rule, to the Director at least 60 days prior to the publication of the major rule as a final rule;

(2) With respect to all other major rules. the agency shall prepare a preliminary Regulatory Impact Analysis. which shall be transmitted. along with a notice of proposed rulemaking. to the Director at least 60 days prior to the publication of a notice of proposed rulemaking. and a final Regulatory Impact Analysis. which shall be transmitted along with the final rule at least 30 days prior to the publication of the major rule as a final rule:

(3) For all rules other than major rules. agencies shall submit to the Director. at least 10 days prior to publication. every notice of proposed rulemaking and final rule.

(d) To permit each proposed major rule to be analyzed in light of the requirements stated in Section 2 of this Order. each preliminary and final Regulatory Impact Analysis shall contain the following information:

(1) A description of the potential benefits of the rule. including any beneficial effects that cannot be quantified in monetary terms. and the identification of those likely to receive the benefits:

(2) A description of the potential costs of the rule. including any adverse effects that cannot be quantified in monetary terms. and the identification of those likely to bear the costs;

(3) A determination of the potential net benefits of the rule. including an evaluation of effects that cannot be quantified in monetary terms;

(4) A description of alternative approaches that could substantially achieve the same regulatory goal at lower cost. together with an analysis of this potential benefit and costs and a brief explanation of the legal reasons why such alternatives. if proposed. could not be adopted: and

(5) Unless covered by the description required under paragraph (4) of this subsection. an explanation of any legal reasons why the rule cannot be based on the requirements set forth in Section 2 of this Order.

(e) (1) The Director. subject to the direction of the Task Force. which shall resolve any issues raised under this Order or ensure that they are presented to the President. is authorized to review any preliminary or final Regulatory Impact Analysis. notice of proposed rulemaking. or final rule based on the requirements of this Order.

(2) The Director shall be deemed to have concluded review unless the Director advises an agency to the contrary under subsection (f) of this Section:

(A) Within 60 days of a submission under subsection (c)(1) or a submission of a preliminary Regulatory Impact Analysis or notice of proposed rulemaking under subsection (c)(2):

(B) Within 30 days of the submission of a final Regulatory Impact Analysis and a final rule under subsection (c)(2): and

(C) Within 10 days of the submission of a notice of proposed rulemaking or final rule under subsection (c)(3).

(f) (1) Upon the request of the Director. an agency shall consult with the Director concerning the review of a preliminary Regulatory Impact Analysis or notice of proposed rulemaking under this Order. and shall. subject to Section 8(a)(2) of this Order. refrain from publishing its preliminary Regulatory Impact Analysis or notice of proposed rulemaking until such review is concluded.

(2) Upon receiving notice that the Director intends to submit views with respect to any final Regulatory Impact Analysis or final rule, the agency shall, subject to Section 8(a)(2) of this Order, refrain from publishing its final Regulatory Impact Analysis or final rule until the agency has responded to the Director's views, and incorporated those views and the agency's response in the rulemaking file.

(3) Nothing in this subsection shall be construed as displacing the agencies' responsibilities delegated by law.

(g) For every rule for which an agency publishes a notice of proposed rulemaking, the agency shall include in its notice:

(1) A brief statement setting forth the agency's initial determination whether the proposed rule is a major rule, together with the reasons underlying that determination; and

(2) For each proposed major rule, a brief summary of the agency's preliminary Regulatory Impact Analysis.

(h) Agencies shall make their preliminary and final Regulatory Impact Analyses available to the public.

(i) Agencies shall initiate reviews of currently effective rules in accordance with the purposes of this Order, and perform Regulatory Impact Analyses of currently effective major rules. The Director, subject to the direction of the Task Force, may designate currently effective rules for review in accordance with this Order, and establish schedules for reviews and Analyses under this Order.

Sec. 4. *Regulatory Review.* Before approving any final major rule, each agency shall:

(a) Make a determination that the regulation is clearly within the authority delegated by law and consistent with congressional intent, and include in the **Federal Register** at the time of promulgation a memorandum of law supporting that determination.

(b) Make a determination that the factual conclusions upon which the rule is based have substantial support in the agency record, viewed as a whole, with full attention to public comments in general and the comments of persons directly affected by the rule in particular.

Sec. 5. *Regulatory Agendas.*

(a) Each agency shall publish, in October and April of each year, an agenda of proposed regulations that the agency has issued or expects to issue, and currently effective rules that are under agency review pursuant to this Order. These agendas may be incorporated with the agendas published under 5 U.S.C. 602, and must contain at the minimum:

(1) A summary of the nature of each major rule being considered, the objectives and legal basis for the issuance of the rule, and an approximate schedule for completing action on any major rule for which the agency has issued a notice of proposed rulemaking;

2) The name and telephone number of a knowledgeable agency official for each item on the agenda; and

(3) A list of existing regulations to be reviewed under the terms of this Order, and a brief discussion of each such regulation.

(b) The Director, subject to the direction of the Task Force, may, to the extent permitted by law:

(1) Require agencies to provide additional information in an agenda; and

(2) Require publication of the agenda in any form.

Sec. 6. *The Task Force and Office of Management and Budget.*

(a) To the extent permitted by law, the Director shall have authority, subject to the direction of the Task Force, to:

(1) Designate any proposed or existing rule as a major rule in accordance with Section 1(b) of this Order;

(2) Prepare and promulgate uniform standards for the identification of major rules and the development of Regulatory Impact Analyses;

(3) Require an agency to obtain and evaluate, in connection with a regulation, any additional relevant data from any appropriate source;

(4) Waive the requirements of Sections 3, 4, or 7 of this Order with respect to any proposed or existing major rule;

(5) Identify duplicative, overlapping and conflicting rules, existing or proposed, and existing or proposed rules that are inconsistent with the policies underlying statutes governing agencies other than the issuing agency or with the purposes of this Order, and, in each such case, require appropriate interagency consultation to minimize or eliminate such duplication, overlap, or conflict;

(6) Develop procedures for estimating the annual benefits and costs of agency regulations, on both an aggregate and economic or industrial sector basis, for purposes of compiling a regulatory budget;

(7) In consultation with interested agencies, prepare for consideration by the President recommendations for changes in the agencies' statutes; and

(8) Monitor agency compliance with the requirements of this Order and advise the President with respect to such compliance.

(b) The Director, subject to the direction of the Task Force, is authorized to establish procedures for the performance of all functions vested in the Director by this Order. The Director shall take appropriate steps to coordinate the implementation of the analysis, transmittal, review, and clearance provisions of this Order with the authorities and requirements provided for or imposed upon the Director and agencies under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, and the Paperwork Reduction Plan Act of 1980, 44 U.S.C. 3501 *et seq.*

Sec. 7. *Pending Regulations.*

(a) To the extent necessary to permit reconsideration in accordance with this Order, agencies shall, except as provided in Section 8 of this Order, suspend or postpone the effective dates of all major rules that they have promulgated in final form as of the date of this Order. but that have not yet become effective. excluding:

(1) Major rules that cannot legally be postponed or suspended:

(2) Major rules that. for good cause. ought to become effective as final rules without reconsideration. Agencies shall prepare. in accordance with Section 3 of this Order. a final Regulatory Impact Analysis for each major rule that they suspend or postpone.

(b) Agencies shall report to the Director no later than 15 days prior to the effective date of any rule that the agency has promulgated in final form as of the date of this Order. and that has not yet become effective. and that will not be reconsidered under subsection (a) of this Section:

(1) That the rule is excepted from reconsideration under subsection (a). including a brief statement of the legal or other reasons for that determination; or

(2) That the rule is not a major rule.

(c) The Director. subject to the direction of the Task Force. is authorized. to the extent permitted by law. to:

(1) Require reconsideration. in accordance with this Order. of any major rule that an agency has issued in final form as of the date of this Order and that has not become effective; and

(2) Designate a rule that an agency has issued in final form as of the date of this Order and that has not yet become effective as a major rule in accordance with Section 1(b) of this Order.

(d) Agencies may. in accordance with the Administrative Procedure Act and other applicable statutes. permit major rules that they have issued in final form as of the date of this Order. and that have not yet become effective. to take effect as interim rules while they are being reconsidered in accordance with this Order. *provided that.* agencies shall report to the Director. no later than 15 days before any such rule is proposed to take effect as an interim rule. that the rule should appropriately take effect as an interim rule while the rule is under reconsideration.

(e) Except as provided in Section 8 of this Order. agencies shall. to the extent permitted by law. refrain from promulgating as a final rule any proposed major rule that has been published or issued as of the date of this Order until a final Regulatory Impact Analysis. in accordance with Section 3 of this Order. has been prepared for the proposed major rule.

(f) Agencies shall report to the Director. no later than 30 days prior to promulgating as a final rule any proposed rule that the agency has published or issued as of the date of this Order and that has not been considered under the terms of this Order:

(1) That the rule cannot legally be considered in accordance with this Order. together with a brief explanation of the legal reasons barring such consideration; or

(2) That the rule is not a major rule. in which case the agency shall submit to the Director a copy of the proposed rule.

(g) The Director, subject to the direction of the Task Force, is authorized, to the extent permitted by law, to:

(1) Require consideration, in accordance with this Order, of any proposed major rule that the agency has published or issued as of the date of this Order; and

(2) Designate a proposed rule that an agency has published or issued as of the date of this Order, as a major rule in accordance with Section 1(b) of this Order.

(h) The Director shall be deemed to have determined that an agency's report to the Director under subsections (b), (d), or (f) of this Section is consistent with the purposes of this Order, unless the Director advises the agency to the contrary:

(1) Within 15 days of its report, in the case of any report under subsections (b) or (d); or

(2) Within 30 days of its report, in the case of any report under subsection (f).

(i) This Section does not supersede the President's Memorandum of January 29, 1981, entitled "Postponement of Pending Regulations", which shall remain in effect until March 30, 1981.

(j) In complying with this Section, agencies shall comply with all applicable provisions of the Administrative Procedure Act, and with any other procedural requirements made applicable to the agencies by other statutes.

Sec. 8. *Exemptions.*

(a) The procedures prescribed by this Order shall not apply to:

(1) Any regulation that responds to an emergency situation, *provided that,* any such regulation shall be reported to the Director as soon as is practicable, the agency shall publish in the **Federal Register** a statement of the reasons why it is impracticable for the agency to follow the procedures of this Order with respect to such a rule, and the agency shall prepare and transmit as soon as is practicable a Regulatory Impact Analysis of any such major rule; and

(2) Any regulation for which consideration or reconsideration under the terms of this Order would conflict with deadlines imposed by statute or by judicial order, *provided that,* any such regulation shall be reported to the Director together with a brief explanation of the conflict, the agency shall publish in the **Federal Register** a statement of the reasons why it is impracticable for the agency to follow the procedures of this Order with respect to such a rule, and the agency, in consultation with the Director, shall adhere to the requirements of this Order to the extent permitted by statutory or judicial deadlines.

(b) The Director, subject to the direction of the Task Force, may, in accordance with the purposes of this Order, exempt any class or category of regulations from any or all requirements of this Order.

Sec. 9. *Judicial Review.* This Order is intended only to improve the internal management of the Federal government, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers or any person. The determinations made by agencies under Section 4 of this Order, and any Regulatory Impact Analyses for any rule, shall be made part of the whole record of agency action in connection with the rule.

Sec. 10. *Revocations*. Executive Orders No. 12044, as amended, and No. 12174 are revoked.

RONALD REAGAN

THE WHITE HOUSE,
February 17, 1981.

Executive Order 12,498
REGULATORY PLANNING PROCESS
21 Weekly Comp. Pres. Doc. 11 (Jan. 7, 1985)

Regulatory Planning Process

Executive Order 12498. January 4, 1985

By the authority vested in me as President by the Constitution and laws of the United States of America, and in order to create a coordinated process for developing on an annual basis the Administration's Regulatory Program, establish Administration regulatory priorities, increase the accountability of agency heads for the regulatory actions of their agencies, provide for Presidential oversight of the regulatory process, reduce the burdens of existing and future regulations, minimize duplication and conflict of regulations, and enhance public and Congressional understanding of the Administration's regulatory objectives, it is hereby ordered as follows:

Section 1. General Requirements. (a) There is hereby established a regulatory planning process by which the Administration will develop and publish a Regulatory Program for each year. To implement this process, each Executive agency subject to Executive Order No. 12291 shall submit to the Director of the Office of Management and Budget (OMB) each year, starting in 1985, a statement of its regulatory policies, goals, and objectives for the coming year and information concerning all significant regulatory actions underway or planned; however, the Director may exempt from this Order such agencies or activities as the Director may deem appropriate in order to achieve the effective implementation of this Order.

(b) The head of each Executive agency subject to this Order shall ensure that all regulatory actions are consistent with the goals of the agency and of the Administration, and will be appropriately implemented.

(c) This program is intended to complement the existing regulatory planning and review procedures of agencies and the Executive branch, including the procedures established by Executive Order No. 12291.

(d) To assure consistency with the goals of the Administration, the head of each agency subject to this Order shall adhere to the regulatory principles stated in Section 2 of Executive Order No. 12291, including those elaborated by the regulatory policy guidelines set forth in the August 11, 1983, Report of the Presidential Task Force on Regulatory Relief, "Reagan Administration Regulatory Achievements."

Sec. 2. Agency Submission of Draft Regulatory Program. (a) The head of each agency shall submit to the Director an overview of the agency's regulatory policies, goals, and objectives for the program year and such information concerning all significant regulatory actions of the agency, planned or underway, including actions taken to consider whether to initiate rulemaking; requests for public comment; and the development of documents that may influence, anticipate, or could lead to the commencement of rulemaking proceedings at a later date, as the Director deems necessary to develop the Administration's Regulatory Program. This submission shall constitute the agency's draft regulatory program. The draft regulatory program shall be submitted to the Director each year, on a date to be specified by the Director, and shall cover the period from April 1 through March 31 of the following year.

(b) The overview portion of the agency's submission should discuss the agency's broad regulatory purposes, explain how they are consistent with the Administration's regulatory principles, and include a discussion of the significant regulatory actions, as defined by the Director, that it will take. The overview should specifically discuss the significant regulatory actions of the agency to revise or rescind existing rules.

(c) Each agency head shall categorize and describe the regulatory actions described in subsection (a) in such format as the Director shall specify and provide such additional information as the Director may request; however, the Director shall, by Bulletin or Circular, exempt from the requirements of this Order any class or category of regulatory action that the Director determines is not necessary to review in order to achieve the effective implementation of the program.

Sec. 3. Review, Compilation, and Publication of the Administration's Regulatory Program. (a) In reviewing each agency's draft regulatory program, the Director shall (i) consider the consistency of the draft regulatory program with the Administration's policies and priorities and the draft regulatory programs submitted by other agencies; and (ii) identify such further regulatory or deregulatory actions as may, in his view, be necessary in order to achieve such consistency. In the event of disagreement over the content of the agency's draft regulatory program, the agency head or the Director may raise issues for further review by the President or by such appropriate Cabinet Council or other forum as the President may designate.

(b) Following the conclusion of the review process established by subsection (a), each agency head shall submit to the Director, by a date to be specified by the Director, the agency's final regulatory plan for compilation and publication as the Administration's Regulatory Program for that year. The Director shall circulate a draft of the Administration's Regulatory Program for agency comment, review, and interagency consideration, if necessary, before publication.

(c) After development of the Administration's Regulatory Program for the year, if the agency head proposes to take a regulatory action subject to the provisions of Section 2 and not previously submitted for review under this process, or if the agency head proposes to take a regulatory action that is materially different from the action described in the agency's final Regulatory Program, the agency head shall immediately advise the Director and submit the action to the Director for review in such format as the Director may specify. Except in the case of emergency situations, as defined by the Director, or statutory or judicial deadlines, the agency head shall refrain from taking the proposed regulatory action until the review of this submission by the Director is completed. As to those regulatory actions not also subject to Executive Order No. 12291, the Director shall be deemed to have concluded that the proposal is consistent with the purposes of this Order, unless he notifies the agency head to the contrary within 10 days of its submission. As to those regulatory actions subject to Executive Order No. 12291, the Director's review shall be governed by the provisions of Section 3(e) of that Order.

(d) Absent unusual circumstances, such as new statutory or judicial requirements or unanticipated emergency situations, the Director may, to the extent permitted by law, return for reconsideration any rule submitted for review under Executive Order No. 12291 that would be subject to Section 2 but was not included in the agency's final Regulatory Program for that year; or any other significant regulatory action that is materially different from those described in the Administration's Regulatory Program for that year.

Sec. 4. Office of Management and Budget. The Director of the Office of Management and Budget is authorized, to the extent permitted by law, to take such actions as may be necessary to carry out the provisions of this Order.

Sec. 5. Judicial Review. This Order is intended only to improve the internal management of the Federal government, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers or any person.

Ronald Reagan

The White House,
January 4, 1985.

[Filed with the Office of the Federal Register, 4:05 p.m., January 4, 1985]

PRESIDENT'S MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

21 Weekly Comp. Pres. Doc. 13 (Jan. 7, 1985)

Subject: Development of Administration's Regulatory Program

With your help and active support, this Administration has substantially reduced the burden and intrusiveness of Federal regulatory programs. In the past three years, we have eliminated many needless rules, revised ill-conceived ones, and held the number of new rules to the minimum necessary. The policies and procedures of Executive Order No. 12291 have imposed long needed discipline on the rulemaking process. As a result, Federal paperwork and the size of the *Federal Register* have declined for four consecutive years—for the first time ever. Our accomplishments so far have been substantial, and we can take pride in them.

Much more can and should be done, however. Regulation has become one of the most important and costly activities of government, yet it is managed far less systematically than direct government spending. Several statutes and Executive Order No. 12291 establish procedures for agency rulemaking, but this is only the final stage of the regulatory process. Developing a government rule often involves years of studies, hearings, and intermediate decisions before even a proposed rule is issued for public comment. Frequently, senior agency officials are involved only after these earlier activities have greatly narrowed the options for final action and precluded effective Administration policy review.

Today, I have signed an Executive Order to establish a regulatory planning process by which we will develop and publish the Administration's Regulatory Program for each year. Under this process, it will be the personal responsibility of the head of each agency to determine—at the beginning of the regulatory process, not at the end—whether a given regulatory venture is consistent with the goals of the Administration and whether agency resources should be committed to it. Each agency head will thus be accountable for the management of the regulatory process, to ensure that policy options are not narrowed prematurely and that each significant regulatory proposal will be considered in relation to others.

To do this, I am requesting each regulatory agency to draft its proposed regulatory policies at the beginning of each year and to set forth a statement of priority regulatory activities, including prerulemaking actions, that constitute the agency's regulatory program for the year. This document should explain how each new activity will carry out the regulatory policies of this Administration and specify the agency's plan for reviewing and revising existing regulatory programs to bring them into accord with Administration policies.

After approval by the head of the agency, the agency's draft regulatory program should be submitted for review by the Office of Management and Budget. This review should focus on consistency with general Administration policy, and with the draft regulatory programs submitted by other agencies. The Office of Management and Budget will circulate a draft of the Administration's Regulatory Program for agency comment, review, and interagency consideration if necessary before the document is put in final form for publication. Issues may be raised for further review by a Cabinet Council or by me or by such other group as I may designate. This review will not interfere with the exercise of authority committed by statute to heads of agencies.

The final regulatory programs of all agencies will be published by the Office of Management and Budget in May as the Administration's Regulatory Program for the twelve-month period beginning April 1, 1985. During the year, this document will be used as a basis for reviews of individual rules under Executive Order No. 12291. At the end of the year, it should be used to assess the agency's performance and to prepare the next year's program.

I am directing the Director of the Office of Management and Budget to implement this regulatory review process immediately and to establish the procedures under which these documents will be submitted to the Director and reviewed. For their first submission, agencies shall submit their draft regulatory program to the Director on the date specified by him. The Director will prepare for my consideration the goals and priorities for all agencies in a manner similar to the identification of significant issues in the fiscal budgetary process.

I am convinced that this process will result in substantial improvements in Federal regulatory policy. It will help ensure that each major step in the process of rule development is consistent with Administration policy. It will enable agency heads to manage agency regulatory actions more effectively, at the same time that it enables the President to hold agency heads more closely accountable for implementing Administration policy.

While ambitious, this program will build on our earlier efforts that have proven successful—the Executive Order No. 12291 review process, the reviews of inherited rules by the Task Force on Regulatory Relief, and the annual "paperwork budget" process.

I am confident that your wholehearted support will make this next stage of our regulatory reform program equally successful.

Ronald Reagan

Office of Management and Budget
REGULATORY IMPACT ANALYSIS GUIDANCE
Regulatory Program of the United States Government--1990
653 (1990)

APPENDIX V

Regulatory Impact Analysis Guidance

A Regulatory Impact Analysis (RIA) should demonstrate that a proposed regulatory action satisfies the requirements of Section 2 of Executive Order No. 12291. To do so, it should show that:

- There is adequate information concerning the need for and consequences of the proposed action;
- The potential benefits to society outweigh the potential costs; and
- Of all the alternative approaches to the given regulatory objective, the proposed action will maximize net benefits to society.

The fundamental test of a satisfactory RIA is whether it enables independent reviewers to make an informed judgment that the objectives of Executive Order No. 12291 are satisfied. An RIA that includes all the elements described below is likely to fulfill this requirement. Although variations consistent with the spirit and intent of the Executive Order may be warranted for some rules, most RIAs should include these elements.

The guidance in this document is not in the form of a mechanistic blueprint, for a good RIA cannot be written according to a formula. Competent professional judgment is indispensable for the preparation of a high-quality analysis. Different regulations may call for very different emphases in analysis. For one proposed regulation, the crucial issue may be the question of whether a market failure exists, and much of the analysis may need to be devoted to that key question. In another case, the existence of a market failure may be obvious from the outset, but extensive analysis might be necessary to estimate the magnitude of benefits to be expected from proposed regulatory alternatives. The amount of analysis (whether scientific, statistical, or economic) that a particular issue requires depends on how crucial that issue is to determine the best alternative and on the complexity of the issue.

Regulatory analysis inevitably involves uncertainties and requires informed professional judgments. Whenever an agency has questions about such issues as the appropriate analytical techniques to use or the alternatives that should be considered, it should consult with the Office of Management and Budget as early in the analysis stage as possible.

This document is written primarily in terms of proposed regulatory changes. However, it is equally applicable to the review of existing regulations. In the latter case, the regulation under review should be compared to a baseline case of no regulation and to reasonable alternatives.

Elements of a Regulatory Impact Analysis

Preliminary and final Regulatory Impact Analyses of major rules should contain five elements. They are: (1) a statement of the potential need for the proposal, (2) an examination of alternative approaches, (3) an analysis of benefits and costs, (4) the rationale for choosing the proposed regulatory action, and (5) a statement of statutory authority. These elements are explained in Sections I–V below.

I. STATEMENT OF POTENTIAL NEED FOR THE PROPOSAL

In order to establish the potential need for the proposal, the analysis should demonstrate that (a) market failure exists that is (b) not adequately resolved by measures other than Federal regulation.

A. Market Failure

The analysis should determine whether there exists a market failure that is likely to be significant. Once such market failure has been identified, the analysis should show how adequately the regulatory alternatives to be considered address the specified market failure. The three major types of market failure are externality, natural monopoly, and inadequate information.

1. *Externality.* An externality occurs when one party's actions impose uncompensated benefits or costs on another outside the marketplace. Environmental problems are a classic case of externality. Another example is the case of common property resources that may become congested or overused, such as fisheries or the broadcast spectrum. A third example is a "public good," such as defense or scientific research, whose distinguishing characteristic is that it is inefficient, or impossible, to exclude individuals from its benefits.

2. *Natural monopoly.* Natural monopoly exists where a market can be served at lowest cost only if production is limited to a single producer. Local telephone, gas, and electricity services are examples.

3. *Inadequate information.* The optimum, or ideal, level of information is not necessarily the maximum possible amount, because information, like other goods, should not be produced when the costs of doing so exceed the benefits. The free market does not

necessarily supply an optimal level of information, because information, once generated, can be disseminated at little or no marginal cost, and because it is commonly infeasible to exclude nonpayers from reaping benefits from the provision of information by others. Where market failure due to inadequate information is the rationale for government intervention, a regulatory action to improve the availability of information will ordinarily be the preferred alternative.

The current state of knowledge about the economics of information is not highly developed. Therefore, regulatory intervention to address an information problem should only be undertaken where there is substantial reason to believe that private incentives to provide information are seriously inadequate and that the specific regulatory intervention proposed will provide net benefits for society.

In many circumstances, the availability of information, while perhaps not optimal, is reasonably adequate, so that attempts to regulate information are as likely to make things worse as to make them better. Information about a particular characteristic of a product, for example, would be reasonably adequate if buyers could determine the existence of the characteristic by inspection of the product before purchase or (in the case of a frequently purchased product) by use of the product. Even if the characteristic could not be determined by buyers, government intervention would not be warranted where sellers have incentives to reveal the existence of the characteristic to buyers. Sellers will have substantial incentives to supply information about any characteristic that is important to buyers and valued positively by them, particularly if the level of the characteristic varies between the products of one seller and another. In these circumstances, sellers whose products rank highly in the valued characteristic can increase their sales by informing buyers of the superiority of their products. If the level of the characteristic does not vary between the products of one seller and another, individual sellers have less incentive to inform buyers about the characteristic. Even so, the incentives of individual sellers or of a trade association to supply information may be substantial.

Sellers are least likely to supply adequate information about a particular characteristic of their product where the characteristic is negatively valued by consumers and the level of the characterstic does not vary between the products of one seller and those of another (e.g., cholesterol in eggs). Even in such circumstances, substantial information about the characteristic may be available to buyers. For example, sellers of rival products may supply the information (e.g., while sellers of butter may have no incentive to tell buyers about cholesterol in butter and its possible consequences, sellers of margarine do have such an incentive). Where the negative characteristic involves a health or safety hazard, the threat of future product liability lawsuits may give sellers adequate incentives to reveal information about the potential hazard. News media, consumer groups, public health agencies, and similar services may supply information not supplied by sellers. In summary, while it is possible to identify situations in which market failure due to inadequate information is more likely to warrant regulatory intervention, each situation must be examined on a case-by-case basis.

There should be a presumption against the need for certain types of regulatory actions, except in special circumstances. A particularly demanding burden of proof is required to demonstrate the potential need for any of the following types of regulations:

- Price controls in competitive markets
- Controls on production or sales in competitive markets
- Mandatory uniform quality standards for goods or services, unless they have hidden safety or other defects and the problem cannot be adequately dealt with by voluntary standards or information disclosing the hazard to potential buyers or users
- Controls on entry into employment or production, except (a) where indispensable to protect health and safety (e.g., FAA tests for commercial pilots) or (b) to manage the use of common property resources (e.g., fisheries, airwaves, Federal lands, and offshore areas).

B. Alternatives to Federal Regulation

Even where a market failure exists, there may be no need for Federal regulatory intervention if other means of dealing with the market failure resolve the problem adequately or better than the proposed Federal regulation would. Among the alternative means that may be applicable are the judicial system (particularly liability cases to deal with health and safety), antitrust enforcement, and workers' compensation systems.

An important alternative that may often be relevant is regulation at the State or local level. In determining whether there exists a potential need for a proposed Federal regulation, the analysis should examine whether regulation at the Federal level is more appropriate than regulation at the State or local level. This analysis may support regulation at the Federal level where rights of national citizenship (such as legal equality among the races) or considerations of interstate commerce are involved. If interstate commerce is involved the analysis should attempt to determine whether the burdens on interstate commerce arising from different State and local regulations are so great that they outweigh the advantages of diversity and local political choice. In some cases, the nature of the market failure may itself suggest the most appropriate governmental level of regulation. For example, pollution that spills across state lines (such as acid rain whose precursors are transported widely in the atmosphere) is probably best controlled by Federal regulation, while localized pollution (such as garbage truck noise) is probably more efficiently handled by local government regulation.

In general, because demands among localities for different governmental services differ and because competition among governmental units for taxpayers and citizens may encourage efficient regulation, the smallest unit of government capable of correcting the market failure should be chosen. This must, however, be balanced against the possibility of higher costs because national firms would be required to comply with more than one set of regulations and because administering similar regulations in more than one governmental unit involves some costs of duplication. Thus, some analysis may be necessary to determine which level of government can most efficiently regulate a specific market failure.

If the analysis does suggest a potential need for a Federal action, it should also consider alternatives of nonregulatory Federal measures. For example, as an alternative to requiring an action or the use of a particular product, it may be more efficient to subsidize it. Similarly, a fee or charge may be a preferable alternative to banning or restricting a product or action. An example would be an effluent discharge fee, which has been recommended as an efficient way to limit pollution, because it causes pollution sources with different marginal costs of abatement to control effluents in an efficient manner. In addition, legislative measures that make use of economic incentives, such as changes in insurance provisions or changes in property rights, should be considered.

II. AN EXAMINATION OF ALTERNATIVE APPROACHES

The RIA should show that the agency has considered the most important alternative approaches to the problem and must provide the agency's reasoning for selecting the proposed regulatory change over such alternatives. Ordinarily, it will be possible to eliminate some alternatives by a preliminary analysis, leaving a manageable number of alternatives to be evaluated by quantitative benefit-cost analysis according to the principles to be described in Section III. The number and choice of alternatives to be selected for detailed benefit-cost analysis is unavoidably a matter of judgment. There must be some balance between thoroughness of analysis and practical limits to the agency's capacity to carry out analysis.

Alternative regulatory actions that should be explored include the following:

1. *More performance-oriented standards for health, safety, and environmental regulations.* Performance standards are generally to be preferred to engineering or design standards because they allow the regulated parties to achieve the regulatory objective in the most cost-effective way. In general, a performance standard should be preferred wherever that performance can be measured or reasonably imputed. Performance standards should also be applied as broadly as possible without creating too much variation in regulatory benefits; for example, by setting emission standards on a plant-wide or firm-wide basis rather than source by source. It is misleading and inappropriate, however, to characterize a standard as a performance standard if it is set so that there is only one feasible way to meet it; as a practical matter, such a standard is a design standard.

2. *Different requirements for different segments of the regulated population.* For example, there might be different requirements for large and small firms. If such a differentiation is made, it should be based on perceptible differences in the costs of compliance or in the benefits to be expected from compliance. For example, some worker safety measures may exhibit economies of scale, that is, lower costs per worker protected in large firms than in small firms. A heavier burden should not be placed on one segment of the regulated population on the grounds that it is better able to afford the higher cost; this is a sure formula for loading disproportionate costs on the most productive sectors of the economy.

3. *Alternative levels of stringency.* In general, both the benefits and costs associated with a regulation will increase with the level of stringency (although costs will eventually increase more rapidly than benefits). It is important to consider alternative levels of stringency to better understand the relationship between stringency and benefits and costs. This approach will increase the information available to the decisionmaker on the option that maximizes net benefits.

4. *Alternative effective dates of compliance.* The timing of a regulation may also have an important effect on its net benefits. For example, costs of a regulation may vary substantially over different compliance dates for an industry that requires a year or more to plan its production runs efficiently. In this instance, a regulation whose requirements provide

sufficient lead time is likely to achieve its goals at a much lower overall cost than a regulation that is effective immediately.

5. *Alternative methods of ensuring compliance.* Compliance alternatives include the appropriate entity (local, State, or Federal) enforcing compliance, whether compliance is enforced by on-site inspection or periodic reporting, and structuring compliance penalties so that they provide the most appropriate incentives.

6. *Informational measures.* Measures to improve the availability of information include government establishment of a standardized testing and rating system (the use of which could be made mandatory or left voluntary), mandatory disclosure requirements (e.g., by advertising, labeling, or enclosures), and government provision of information (e.g., by government publications, telephone hot-lines, or public interest broadcast announcements). If intervention is necessary to address a market failure arising from inadequate information, informational remedies will generally be the preferred approaches. As an alternative to a mandatory standard, a regulatory measure to improve the availability of information has the advantage of being a more market-oriented approach. Thus, providing consumers information about concealed characteristics of consumer products gives consumers a greater choice than banning these products (for example, consumers are likely to benefit more from information on energy efficiency than from a prohibition on sale of appliances or automobiles falling below a specified standard of energy efficiency).

Except for prohibiting indisputably false statements (whose banning can be presumed beneficial), specific informational measures must be evaluated in terms of their benefits and costs. Paradoxically, the current state of knowledge does not generally permit the benefits and costs of informational remedies to be measured very accurately. Nonetheless, it is essential to consider carefully the costs and benefits of alternative informational measures, even if they cannot be quantified very precisely. Some effects of informational measures can easily be overlooked. For example, the costs of a mandatory disclosure requirement for a consumer product include not only the obvious cost of gathering and communicating the required information, but also the loss of any net benefits of information displaced by the mandated information, the cost of any inaccurate consumer interpretation of the mandated information, and any inefficiencies arising from the incentive that mandatory disclosure of a particular characteristic gives to producers to overinvest in improving that specific characteristic of their products.

Where information on the benefits and costs of alternative informational measures is insufficient to provide a clear choice between them, as will often be the case, the least intrusive alternative, sufficient to accomplish the regulatory objective, should be chosen. For example, it will often be sufficient for government to establish a standardized testing and rating system without mandating its use, because firms that score well according to the system will have ample incentive to publicize the fact.

7. *More market-oriented approaches.* In general, alternatives that provide for more market-oriented approaches, with the use of economic incentives replacing command-and-control requirements, should be explored. Market-oriented alternatives that may be considered include fees, subsidies, penalties, marketable rights or offsets, changes in liabilities or property rights, and required bonds, insurance or warranties (in many instances, implementing these alternatives will require legislation).

III. ANALYSIS OF BENEFITS AND COSTS

A. General Principles

The preliminary analysis called for by Sections I and II should have narrowed the number of alternatives to be considered by quantitative benefit-cost analysis to a workable number. Ordinarily, one of the alternatives will be to promulgate no regulation at all, and this alternative will commonly serve as the base from which increments in benefits and costs are calculated for the other alternatives. Even if alternatives such as no regulation are not permissible statutorily, it is often desirable to evaluate the benefits and costs of such alternatives to determine if statutory change would be desirable. Departments and agencies bear a similar burden when they perform environmental impact statements in which alternatives that lie outside their statutory authority must be considered.

In some cases, the desirability of specific alternatives outside the scope of the agency's regulatory authority may be determined by use of basic economic concepts in light of the principles enumerated in Section I. In other instances, however, only a quantitative benefit-cost analysis can resolve the question, and such alternatives will need to be included in the analysis of this section. In addition, alternative forms of agency regulation will need to be evaluated by quantitative benefit-cost analysis.

1. *Evaluation of Alternatives.* Except where prohibited by law, the primary criterion for choice among alternatives is expected net benefit (benefits minus costs). Other criteria may sometimes produce equivalent results, but they must be used with care to avoid

the potentially serious pitfalls to be explained in Part B of this section and in Section IV. Both benefits and costs should be expressed in discounted constant dollars. Appropriate discounting procedures are discussed in the following section.

The distinction between benefits and costs in benefit-cost analysis is somewhat arbitrary, since a positive benefit may be considered a negative cost, and vice versa, without affecting the net benefit (benefits minus costs) decision criterion. This implies that the considerations applicable to benefit estimates also apply to costs and vice versa. The different issues are considered separately under benefits or costs in Sections B and C below according to where they most often arise.

If the proposed regulation is composed of a number of distinct provisions, it is important to evaluate the benefits and costs of the different provisions separately. The interaction effects between separate provisions (such that the existence of one provision affects the benefits or costs arising from another provision) may complicate the analysis but does not eliminate the need to examine provisions separately. In such a case, the desirability of a specific provision may be appraised by determining the net benefits of the proposed regulation with and without the provision in question. Where the number of provisions is large and interaction effects are pervasive, it is obviously impractical to analyze all possible combinations of provisions in this way. Some judgment must be used to select the most significant or suspect provisions for such analysis.

2. *Discounting*. The monetary values of benefits and costs occurring in different years should be discounted to their present values so that they are comparable. This is not the same as correcting for inflation. An inflation adjustment is made with a price index, whereas discounting to present value is done with a discount rate. Benefits and costs expressed in constant (i.e., unaffected by inflation) dollars must further be discounted to present values before benefits and costs in different years can be added together to determine overall net benefits. As an equivalent alternative to discounting nonmonetized benefits, the RIA may use the discount rate to annualize (amortize) costs over a period that corresponds to the occurrence of the benefits. Regardless of the discounting procedure selected, the RIA must contain a schedule indicating when the benefits and costs occur.

Discounting takes account of the fact that resources (goods or services) in a given year are worth more than identical resources in a later year. The underlying reason for this is that resources can be invested so as to return more resources later. Partly because of this productivity of investment, individuals value consumption in earlier years higher than consumption in later years.

Modern analysis of discounting for public programs stresses the distinction between two rates of return:

- The *before-tax* rate, also known as the opportunity cost of capital. This is the real rate of return to marginal private investments. Estimates of the opportunity cost of capital in the U.S. economy vary substantially. The 10 percent discount rate specified by OMB Circular A–94 for use in evaluating government programs is intended to represent the opportunity cost of capital.
- The *after-tax* rate, also known as the consumption rate of interest. This represents the rate at which consumers would be willing to exchange present for future consumption, that is, the rate at which consumers must be compensated for postponing their consumption. As with the opportunity cost of capital, alternative estimates of the consumption rate of interest vary significantly. A rate of 4 percent is reasonably representative of the range of alternative estimates and consistent with a 10 percent before-tax rate of return.

The basic concept underlying the academic literature on public-sector discounting is that economic welfare is ultimately determined by consumption and only indirectly by investment. Therefore, the value of investment must be measured by the value of the subsequent increase in consumption it permits. Any effect that a government program has on investment must be converted to an equivalent time-stream of consumption before being discounted. In practice, this results in a complex procedure that uses the before-tax and after-tax discount rates, a "shadow price of capital," and the impacts of benefits and costs on investment. It is recommended that agencies continue to use the well-understood procedure of discounting by a single rate (as specified by OMB Circular A–94) and, when appropriate, perform additional analysis using the more complex shadow-price-of-capital methodology.

There are two circumstances when it is important to perform sensitivity analysis using the shadow price of capital approach:

(a) Where the costs of the regulation are almost entirely current costs borne by consumers. In such circumstances, a low rate close to 4 percent is called for. (This assumes, as is normally the case, that the benefits are all in the form of disposable income or other benefits directly to individuals.)

(b) Where some of the costs are capital costs financed out of saving *and* there is a long period between the time when most costs are incurred and the time when most benefits accrue. In general, the *smaller* the fraction of costs that are capital costs financed out of saving and the *longer* the time period between costs and benefits, the greater the likelihood that the shadow price of capital approach will be correct.

It is conceptually incorrect to adjust the discount rate as a device to account for the uncertainty of expected future benefits and costs. This procedure will virtually never lead to a correct adjustment of benefits and costs. Therefore, risk and uncertainty should be dealt with according to the principles in Section 3 below and not by changing the discount rate.

3. *Treatment of Risk and Uncertainty.* Where uncertainties exist about important parameters affecting the expected benefits or costs of an alternative under consideration, it is essential to carry out a *sensitivity analysis* to determine the effect on net benefits of plausible variations in the value of the parameters. One form of sensitivity analysis involves calculation of the "switch-point" value of the parameter under examination, that is, the value of the parameter at the break-even point at which the net-benefit decision criterion switches over from favoring one alternative to favoring another. When this break-even point of the parameter value is determined, the analysis may then consider the probability that the true parameter value is above or below the break-even value. For example, if the major uncertainty about a proposed regulation were its cost, the analysis could calculate how high the cost would need to be in order to reduce the net benefit of the proposal to zero. If it is judged to be highly unlikely that the actual cost would be that high or higher, it may be concluded that the choice of the proposed alternative is not sensitive to uncertainties about its cost.

A primary objective of sensitivity analysis is to identify where additional analysis may be most needed. If the choice of a specific regulatory action is sensitive to alternative parameter values that are about equally likely to be true, more research to better determine the true parameter value could be very valuable.

Wherever parameter estimates are uncertain, for either benefits or costs, expected-value estimates should be presented. Hypothetical best-case or worst-case estimates may be presented as alternatives for sensitivity analysis. Where possible, information about the probability distribution of the parameter estimate should be presented.

A common situation that arises in estimating both benefits and costs is that a number of different studies may exist which together provide a range of different estimates for a particular parameter. In general, it is not appropriate to use the midpoint of the range of extreme values provided by the studies. Such a technique ignores the information provided by all studies except those providing the extreme values, which may be the least reliable. The preferred approach to deriving an expected-value estimate of a particular parameter in this situation would be to derive it as a weighted average of the estimates of the individual studies, with the weight of each estimate being based on the reliability (in the best judgment of the agency) of the study that produced it.

Where expected future benefits or costs are uncertain, their value to those who receive them may be different from their value if they were certain. (Often, but not always, a certain future benefit is worth more to people than an uncertain future benefit with the same expected value.) As noted in the previous section, it is incorrect to adjust the discount rate as a device to account for the riskiness of future benefits or costs. Any allowance for risk should be made by adjusting the monetary values (for the year in which they occur) of the uncertain benefits and costs so that they are expressed in terms of their "certainty-equivalents."

For an uncertain benefit in future year X, the certainty-equivalent is the number of certain dollars in year X that the uncertain benefit is worth to its recipient. For example, suppose that a particular regulation reduces the probability of fire in a particular type of facility. As part of a benefit-cost analysis for this regulation, the dollar value of the expected reduction in fire loss would be calculated. The owners of the protected facilities place a higher dollar value on the risk of a fire than the expected dollar value of the loss. This is demonstrated by their willingness-to-pay for fire insurance. Therefore, their relative net cost (the percentage difference between insurance premiums and insurance company claim payments) for fire insurance can be used to increase the expected dollar value of the reduction in fire loss to its certainty-equivalent value.

In the example of the preceding paragraph, the adjustment for risk would involve an increase in the value of the benefit, whereas uncertainty of a benefit is normally thought to reduce its certainty-equivalent value. The reason is that even though this benefit by itself is uncertain, it acts to reduce the overall level of risk that would prevail in the absence of the regulation. This illustrates the important principle that what matters is not the variability or riskiness of a regulation's net benefits by themselves but the regulation's effect on risk and uncertainty overall.

While an adjustment to account for risk may be called for in the fire-risk example given, a similar adjustment for the value of reductions in fatalities and injuries would not be appropriate. Assuming that the values of fatalities and injuries have been derived by the willingness-to-pay methodology recommended in Section B.2 below, they would already represent the certainty-equivalent value of the uncertain risk. This is because the estimated dollar values represent the certain dollar amounts that individuals would sacrifice to reduce these risks.

Probably, in most cases, it will not be advisable to adjust for risk and uncertainty. As a theoretical matter, no adjustment for risk is necessary wherever the net benefits are widely dispersed among many individuals and are not correlated with disposable income. And in cases where this does not apply, risk may be relatively unimportant or may already be taken into account by use of the willingness-to-pay methodology. In other cases, there may be no practical way to quantify the value of changes in risk.

4. *Assumptions.* Where benefit or cost estimates are heavily dependent on certain assumptions, it is essential to make these assumptions explicit and, where alternative assumptions are plausible, to carry out sensitivity analyses based on plausible alternative assumptions. If the decision criterion proves to be sensitive to alternative plausible assumptions, this may necessitate further research to develop more evidence on which of the alternative assumptions is the most appropriate. Because the adoption of a particular estimation methodology sometimes implies major hidden assumptions, it is important to analyze estimation methodologies carefully to make hidden assumptions explicit.

5. *International Trade Effects.* In calculating the benefits and costs of a proposed regulatory action, generally no explicit distinction needs to be made between domestic and foreign resources. If, for example, compliance with a proposed regulation requires the purchase of specific equipment, the opportunity cost of that equipment is ordinarily best represented by its domestic cost in dollars, regardless of whether the equipment is produced domestically or imported. The relative value of domestic and foreign resources is correctly represented by their respective dollar values, as long as the foreign exchange value of the dollar is determined by a free exchange market. Nonetheless, an awareness of the role of international trade may be quite useful for assessing the benefits and costs of a proposed regulatory action. For example, the existence of foreign competition usually makes the demand curve facing a domestic industry more elastic than it would be otherwise. Elasticities of demand and supply frequently can significantly affect the magnitude of the benefits or costs of a regulation.

A regulation that discriminates unjustifiably against foreign exporters is a form of economic protectionism. The economic loss to the U.S. due to the fact that protectionism is economically inefficient will be reflected in the net benefit estimate of any properly conducted benefit-cost analysis. However, a benefit-cost analysis will generally not be able to measure the potential U.S. loss from the threat of future retaliation by foreign governments. Therefore, special attention should be given to any possibility that a regulation would unjustifiably discriminate between domestic and foreign producers and consumers—both discrimination against foreigners and discrimination in favor of foreigners.

The fact that a regulation has a differential effect on foreigners as compared to Americans does not necessarily constitute discrimination. If, for example, an automobile safety standard could be complied with less expensively by large cars than by small cars, such a standard would be more favorable to American car producers, who produce relatively more large cars compared to the fleet mix of foreign producers. Nonetheless, such a differential effect would not be discriminatory if the difference in compliance cost between large and small cars was necessary to achieve legitimate regulatory objectives in the most efficient way.

If a regulation has an adverse differential effect on foreign producers or consumers relative to domestic producers and consumers that is not necessary to realize regulatory goals efficiently, then a discriminatory effect on foreign trade exists. The RIA should identify any substantial differential effect on international trade and explain why it is necessary to achieve legitimate regulatory goals in the most efficient way. One means for reducing the likelihood of international discrimination would be for a U.S. product standard for an internationally traded good to be based on an international standard, wherever an international standard exists and is compatible with the health, safety, or environmental needs of the U.S. International harmonization can be beneficial for regulations directly setting standards for internationally traded goods or services. For example, it would be appropriate to consider international harmonization in setting safety standards for automobiles. There is no similar advantage to international harmonization where a regulation does not directly affect the quality of an internationally traded good or service, even if it indirectly affects its costs (e.g., environmental controls for automobile plants).

6. *Distributional Effects.* Those who bear the costs of a regulation and those who enjoy its benefits often are not the same persons. Benefits and costs of regulation may also be distributed unevenly over time, perhaps spanning several generations. There is no generally accepted way to monetize potential

distributional effects. Attempts to incorporate distributional concerns in benefit-cost analysis require the establishment of unequal weights for different groups in society. Because positive economics treats equally the willingness-to-pay of all individuals, any alternative weighting would undermine the objective character of the analysis. Policymakers may wish, however, to take account of the distributional effects of various regulatory alternatives. Therefore, where there are potentially important differences between those who stand to gain and those who stand to lose under alternative regulatory options, the RIA should identify these groups and indicate the nature of the differential effects. The RIA should also present information on the streams of benefits and costs over time as well as present value estimates, particularly where intergenerational effects are concerned.

B. Benefit Estimates

The RIA should state the beneficial effects of the proposed regulatory change and its principal alternatives. In each case, there should be an explanation of the mechanism by which the proposed action is expected to yield the anticipated benefits. An attempt should be made to quantify all potential real incremental benefits to society in monetary terms to the maximum extent possible. A schedule of monetized benefits should be included that would show the type of benefit and when it would accrue; the numbers in this table should be expressed in constant, undiscounted dollars. Any expected incremental benefits that cannot be monetized should be explained.

The RIA should identify and explain in detail the data or studies on which benefit estimates are based. Where benefit estimates are derived from a statistical study, the RIA must provide sufficient information so that an independent observer can determine the representativeness of the sample, whether it was extrapolated from properly in developing aggregate estimates, and whether the results are statistically significant.

For regulations addressing health and safety risks, the calculation of potential benefits should derive from the agency's estimate of the mean expected value of the reduction in risk attributable to the standard. Estimates of the prevailing level of risk and of the reduction in risk to be anticipated from a proposed standard should be unbiased expected-value estimates rather than hypothetical worst-case estimates. Extreme safety or health results should be weighted (along with intermediate results) by the probability of their occurrence to estimate the expected result implied by the available evidence. In addition, to the extent possible, the distribution of probabilities for various possible results should be presented separately, so as to allow for an explicit margin of safety, where required, in final decisions. If a margin of safety is to be provided, the proper place for it is the final stage of the decision-making process, not by adjusting the risk or benefit estimates in a conservative direction at the information-gathering or analytical stages of the process. Conservative estimates should be presented as alternatives to best estimates for sensitivity analysis but should not substitute for them.

It is important to guard against double-counting of benefits. For example, if a regulation improved the quality of the environment in a community, the value of real estate in the community might rise, reflecting the greater attractiveness of living in the improved environment. It would ordinarily be incorrect to include the rise in property values among the benefits of the regulation. Ordinarily, the value of environmental benefits (e.g., reduced health risks, scenic improvements) will already be included among the benefits. The rise in property values reflects the capitalized value of these improvements. Therefore, to count as benefits both the value of the environmental improvements and the corresponding increase in property values is to count the same benefits twice. Only where a direct estimate of the benefits has not been included would it be appropriate to include the increase in property values among the benefits.

1. *General Considerations*. The concept of "opportunity cost" is the appropriate construct for valuing both benfits and costs. The principle of "willingness-to-pay" captures the notion of opportunity cost by providing an aggregate measure of what individuals are willing to forgo so as to enjoy a particular benefit. Market transactions provide the richest database for estimating benefits based on willingness-to-pay, so long as the goods and services affected by a potential regulation are traded in markets. Estimation problems arise in a variety of instances, of course, where prices or market transactions are difficult to monitor. Markets may not even exist in some instances, forcing regulatory analysts to develop appropriate proxies that simulate market exchange. Indeed, the analytical process of deriving benefit estimates by simulating markets may suggest alternative regulatory strategies that create such markets.

Willingness to pay always provides the preferred measure of benefits. Estimates of willingness-to-pay based on observable and replicable behavior deserve the greatest level of confidence. Considerably less confidence should be conferred on benefit estimates that are neither derived from market transactions nor based on behavior that is observable or replicable. Of course, innovative benefit estimation methodologies may be necessary in some cases, and should be encouraged. However, reliance upon such methods intensifies the need for quality control to ensure that estimates derived conform as closely as possible to what would be observed if markets existed.

2. *Principles for Valuing Directly Observable Benefits.* Ordinarily, goods and services are to be valued at their market prices. However, in some instances, the market value of a good or service may not reflect its true value to society. If a regulatory alternative involves changes in such a good or service, its monetary value for purposes of benefit-cost analysis should be derived using an estimate of its true value to society (often called its "shadow price"). For example, suppose a particular air pollutant damages crops. One of the benefits of controlling that pollutant will be the value of the crop saved as a result of the controls. If the price of that crop is held above the free-market equilibrium price by a government price-support program it will overstate the value of the benefit of controlling the pollutant if the crop saved were valued at the market price established by the support program. The social value of the benefit should be calculated using a shadow price for crops subject to price supports. The estimated shadow price should reflect the value to society of marginal uses of the crop (e.g., the world price if the marginal use is for exports). If the marginal use is to add to very large surplus stockpiles, the shadow price would be the value of the last units released from storage minus storage cost. Therefore, where stockpiles are large and growing, the shadow price is likely to be low and could well be negative.

3. *Principles for Valuing Benefits that are Indirectly Traded in Markets.* In some important instances, a benefit corresponds to a good or service that is indirectly traded in the marketplace. Important examples include reductions in the health-and-safety risks, the use-value of environmental amenities and scenic vistas, and savings in time. To estimate the monetary value of such an indirectly traded good, the willingness-to-pay valuation methodology is still conceptually superior, because the amount that people are willing to pay for a good or service is the best measure of its value to them. As noted in Sections 4 and 5 immediately following, alternative methods may be used where there are practical obstacles to the accurate application of direct willingness-to-pay methodologies.

A variety of methods have been developed for estimating indirect benefits. Generally, these methods apply statistical techniques to distill from observable market transactions the portion of willingness-to-pay that can be attributed to the benefit in question. Examples include estimates of the value of environmental amenities derived from travel-cost studies, hedonic price models that measure differences or changes in the value of land, and statistical studies of occupational-risk premiums in wage rates.

Contingent-valuation methods have become increasingly popular for estimating indirect benefits, but they suffer from the fact that survey instruments have a limited capacity to simulate real-world market behavior. Benefit estimates derived from contingent-valuation studies thus have a greater burden of analytical care to ensure that they represent in an unbiased manner what actually occurs in the marketplace.

4. *Principles and Methods for Valuing Benefits that are Not Traded Directly or Indirectly in Markets.* Some types of goods, such as the social benefit of preserving environmental amenities apart from their use and direct enjoyment by people, are not traded directly or indirectly in markets. The practical obstacles to accurate measurement are similar to (but generally more severe than) those arising with respect to indirect benefits, principally because there are not market transactions to provide data for willingness-to-pay estimates.

Contingent-valuation methods provide the only analytical approaches currently available for estimating the benefits of such untraded goods. The absence of observable and replicable behavior with respect to the benefit in question, combined with the difficulties of avoiding bias in contingent-valuation studies, argues for great care and circumspection in the use of such methods. This means, for example, that estimates of willingness-to-pay must incorporate the variety of alternative means individuals have of expressing value for untraded goods. Moreover, analyses must faithfully capture individuals' budget constraints, which restrict their willingness-to-pay for untraded as well as traded goods and services. Benefit analyses derived from contingent valuation and similar methods thus require considerable analytic rigor in design and careful execution. Absent such efforts, analyses based heavily on the benefits of untraded goods and services ordinarily would fail the test of a satisfactory RIA.

5. *Methods for Valuing Health and Safety Benefits.* For health and safety benefits, a distinction should be made between risks of nonfatal illness or injury and fatality risks.

(a) *Nonfatal illness and injury.* Although the willingness-to-pay approach is conceptually superior, the current state of empirical research in the area is not sufficiently advanced to assure that estimates derived by this method are necessarily superior to direct-cost valuations of reductions in risks of nonfatal illness or injury. Any injury-value estimate from a willingness-to-pay study is necessarily an average over a specific combination of injuries of varying severity. If the average injury severity in such a study is greatly different from that for the regulatory action under study, then the study's estimated injury value may not be appropriate for evaluating that action. Accordingly, the agency should use whichever approach it considers most appropriate for the decision at hand. The primary components of the direct-cost approach are medical costs and the value of lost production. Possibly important costs that may be omitted by the use of the direct-cost approach are the value of pain and suffering and the value of time lost from leisure and other activities that are not economically directly productive.

(b) *Fatality*. Reductions in fatality risks are best monetized according to the willingness-to-pay approach. The value of changes in fatality risk is sometimes expressed in terms of the "value of life." This is something of a misnomer since the value of a life really refers to the sum of many small reductions in fatality risk. For example, if the annual risk of death is reduced by one in a million for each of two million people, that represents two "statistical lives" saved per year (two million × one millionth = two). If the annual risk of death is reduced by one in 10 million for each of 20 million people, that also represents two statistical lives saved. The conclusion that the fatality risk reductions in these two cases are equivalent implies an assumption. The implicit assumption—that equal increments in risk are valued equally—allows different risk increments to be added together and compared directly. As a different example, suppose there are two alternative reductions in the annual risk faced by an individual:

A: from $.10 \times 10^{-5}$ to $.09 \times 10^{-5} = .01 \times 10^{-5}$
B: from 1.00×10^{-5} to $.99 \times 10^{-5} = .01 \times 10^{-5}$

Since in both cases the reduction in annual risk is the same ($.01 \times . 10^{-5}$), the value of A and B should be considered the same.

The assumption that equal increments in fatality risk are of equal value is a legitimate one, so long as the level of fatality risk is below 10^{-4} annually. There is evidence that the willingness-to-pay value for increments in fatality risk does not change significantly over a wide range of risk exposure below 10^{-4} annually.

For levels of annual risk exposure of 10^{-4} and above it cannot be assumed that equal increments of risk are valued equally. At these higher risk levels, it is particularly important to distinguish between situations of voluntary risk assumption and those of involuntary risk. Where the high risk is involuntary, it is appropriate to value reductions in risk from that high level more highly than equal risk reductions at lower risk levels. In general, the greater the risk that an individual bears, the higher will be the value the individual places on marginal changes in risk. On the other hand, where a high risk is chosen voluntarily those assuming the risk tend to be persons who place a relatively low value on averting safety risks. Empirical studies of risk premiums in high-risk occupations suggest that reductions in voluntarily assumed high risks should be valued less than equal risk reductions at ordinary risk levels.

Estimates of the value of fatality risks refer only to changes in an uncertain risk of death. They have no application to the certain prevention of the death of an identifiable individual.

6. *Alternative Methodological Frameworks for Estimating Health and Safety Benefits*. Several alternative ways of incorporating fatality risks into the framework of benefit-cost analysis may be appropriate. These may involve either explicit or implicit valuation of fatality risks.

One acceptable explicit valuation approach would be for the agency to select a single value for reductions in fatality risk at ordinary risk levels (below 10^{-4} annually) and use this value consistently for evaluating all its programs that affect ordinary fatality risks. Another acceptable explicit valuation approach would be to use a range of values for reductions in fatality risk and apply sensitivity analysis as with other parameters that have alternative plausible values. The range of alternative values should be a reasonable one, not one that includes the most extreme upper and lower values of fatality risk reduction that have been estimated. Extreme values are more appropriate for instances of extraordinarily high risks (above 10^{-4} annually), with the extreme low values being appropriate where voluntary assumption of high risk leads to self-selection and the extreme high values being appropriate where the high risk is involuntarily assumed.

Where the analysis uses a range of alternative values for reductions in fatality risk, it may be useful to calculate break-even values, as in other sensitivity analyses. This requires calculating the borderline value of reductions in fatality risk at which the net benefit decision criterion would switch over from favoring one alternative to favoring another (i.e., the value of fatality risk at which the net benefits of the two alternatives are equal). This method will frequently be infeasible because of its computational demands or because alternatives are continuous rather than discrete (e.g., alternative stringencies for exposure levels), but where appropriate, it is a useful supplement to the sensitivity analysis.

An implicit valuation approach could entail calculations of the cost per unit of reduction in fatality risk (cost per "statistical life saved"), with costs defined as costs minus monetized benefits. This must be used with care since there is a serious potential pitfall: It is *not* correct to choose between two mutually exclusive alternatives by selecting the alternative with lowest cost per statistical life saved. The alternative with higher cost per life saved may nonetheless be the alternative with the higher net benefit to society.

The way to avoid this pitfall while retaining the implicit valuation approach is to make all calculations of cost per life saved in terms of increments between alternatives. Alternatives should be arrayed in order of their total reduction in expected fatalities and the incremental cost per life saved calculated between each adjacent pair of alternatives. In contrast to explicit valuation approaches, this avoids the necessity of specifying in advance a value for reductions in fatality risks. However, a range of values will be implied by the final selection of an alternative. This range should be consistent with estimated values of reductions in fatality risks calculated according to the willingness-to-pay methodology.

Another way of expressing reductions in fatality risks is in terms of life-years saved. For example, if a regulation protected individuals whose average remaining life expectancy was 40 years, then a risk reduction of one fatality would be expressed as 40 life-years saved. Such a refinement may be desirable for regulations that disproportionately protect young people (e.g., motor vehicle safety regulations) or elderly people (e.g., regulations controlling carcinogens). To derive the value of a life-year saved from an estimate of the value of life, first determine the average remaining life expectancy of the sample population in the study from which the estimate was drawn. Assuming that the average age of the sample population is known, the average remaining life expectancy may be derived from actuarial tables giving life expectancy in relation to age. Using standard compound interest tables, the value of a life-year saved can then be determined as the estimated value of life annualized over a period equal to the number of years of remaining average life expectancy.

C. Cost Estimates

1. *General Considerations.* The opportunity cost of an alternative is the value of the benefits foregone as a consequence of that alternative. For example, the opportunity cost of banning a product (e.g., a drug, food additive, or hazardous chemical) is the foregone net benefit of that product. It is measured by changes in producers' and consumers' surpluses. (Producers' surplus is the difference between the amount a producer is paid for a unit of a good and the minimum amount the producer would accept to supply that unit. It is measured by the distance between the price and the supply curve for that unit. Consumers' surplus is the difference between what a consumer pays for a unit of a good and the maximum amount the consumer would be willing to pay for that unit. It is measured by the distance between the price and the demand curve for that unit.) As another example, even if a resource required by regulation does not have to be paid for because it is already owned by the regulated firm, nonetheless, the use of that resource to meet the regulatory requirement has an opportunity cost equal to the net benefit it would have provided in the absence of the requirement. Any such foregone benefits for an alternative should be monetized wherever possible and either added to the costs or subtracted from the benefits of that alternative. Any costs that are averted as a result of an alternative should be monetized wherever possible and either added to the benefits or subtracted from the costs of that alternative.

All costs calculated should be incremental, that is, they should represent changes in costs that would occur if the regulatory alternative is chosen compared to costs in the base case (ordinarily no regulation or the existing regulation). Future costs that would be incurred even if the regulation is not promulgated, as well as costs that have already been incurred (sunk costs), are not part of incremental costs. If marginal cost is not constant for any component of costs, incremental costs should be calculated as the area under the marginal cost curve over the relevant range.

Costs include private-sector compliance costs, government administrative costs, and costs of reallocating workers displaced as a result of the regulation. Costs that are not monetary outlays must be included and should be attributed a monetary value wherever possible. Such costs may include the value (opportunity cost) of benefits foregone, losses in consumers' or producers' surpluses, discomfort or inconvenience, and loss of time. A schedule of monetized costs should be included that would show the type of cost and when it would occur; the numbers in this table should be expressed in constant, undiscounted dollars. Any expected incremental costs that cannot be monetized should be explained. An important type of cost that often cannot be quantified is a slowing in the rate of innovation or of adoption of new technology. For example, regulations requiring a costly and time-consuming approval process for new products or new facilities may have such costs, as may regulations setting much more stringent standards for new facilities than existing ones.

Two accounting cost concepts that should not be counted as costs in benefit-cost analysis are interest and depreciation. The time value of money is already accounted for by the discounting of benefits and costs. Depreciation is already taken into account by the time distribution of benefits and costs; the only legitimate use for depreciation calculations in benefit-cost analysis is to estimate the salvage value of a capital investment.

2. *Real Costs versus Transfer Payments.* An important, but sometimes difficult, problem in cost estimation is to distinguish between real costs and transfer payments. Transfer payments are not genuine costs but payments for which no real good or service is received in return. Several examples of problems that may arise from the confusion between transfer payments and real costs (or benefits) may help to identify situations in which further analysis of the problem may be warranted. Monopoly profits, insurance payments, government subsidies and taxes, and distribution expenses are four potential problem areas.

(a) *Monopoly profits.* If, for example, sales of a competitively produced product were restricted by a government regulation so as to raise prices to consumers, the resulting monopoly profits are not a benefit of the rule, nor is their payment by consumers a cost. The real benefit-cost effects of the regulation would be represented by changes in producers' and consumers' surpluses.

(b) *Insurance payments.* Potential pitfalls in benefit-cost analysis may also arise in the case of insurance payments, which are transfers. Suppose, for example, a worker safety regulation, by decreasing employee injuries, led to reductions in firms' insurance premium payments. It would be incorrect to count the amount of the reduction in insurance premiums as a benefit of the rule. The proper measure of benefits is the value of the reduction in worker injuries, monetized as described previously, plus any reduction in real costs of administering insurance (such as the time of insurance company employees needed to process claims) due to the reduction in worker insurance claims. Reductions in insurance premiums that are matched by reductions in insurance claim payments are changes in transfer payments, not benefits.

(c) *Indirect taxes and subsidies.* A third instance where special treatment may be needed to deal with transfer payments is the case of indirect taxes (tariffs or excise taxes) or subsidies on specific goods or services. Suppose a regulation requires firms to purchase a $10,000 piece of imported equipment, on which there is a $1,000 customs duty. For purposes of benefit-cost analysis the cost of the regulation for each firm ordinarily would be $10,000, not $11,000, since the $1,000 customs duty is a transfer payment from the firm to the Treasury, not a real resource cost. This approach, which implicitly assumes that the equipment is supplied at constant costs, should be used except in special circumstances. Where the taxed equipment is not supplied at constant cost, the technically correct treatment is to calculate how many of the units purchased as a result of the regulation are supplied from increased production and how many from decreased purchases by other buyers. The former units would be valued at the price without the tax and the latter units would be valued at the price including tax. This calculation is usually difficult and imprecise because it requires estimates of supply and demand elasticities, which are often difficult to obtain and inexact. Therefore, this treatment should only be used where the benefit-cost conclusions are likely to be sensitive to the treatment of the indirect tax. While costs ordinarily should be adjusted to remove indirect taxes on specific goods or services as described here, similar treatment is not warranted for other taxes, such as general sales taxes applying equally to most goods and services or income taxes.

(d) *Distribution expenses.* The treatment of distribution expenses is also a source of potential error. For example, suppose a particular regulation raises the cost of a product by $100 and that wholesale and retail distribution expenses are on average 50 percent of the factory-level cost. It would ordinarily be incorrect to add a $50 distribution markup to the $100 cost increase to derive a $150 incremental cost per product for benefit-cost analysis. Most real resource costs of distribution do not increase with the price of the product being distributed. In that case, either distribution expenses would be unchanged or, if they increased, the increase would represent distributor monopoly profits. Since the latter are transfer payments, not real resource costs, in neither case should additional distribution expenses be included in the benefit-cost analysis. However, increased distribution expenses should be counted as costs to the extent that they correspond to increased real resource costs of the distribution sector as a result of the change in the price or characteristics of the product.

D. Expenditure Rules

Regulations establishing terms or conditions of Federal grants, contracts, or financial assistance call for a different form of regulatory analysis than do other types of regulation. In some instances, a full-blown benefit-cost analysis may be appropriate to inform Congress and the President more fully about the desirability of the program, but this would not ordinarily be required in a Regulatory Impact Analysis. The primary function of the RIA for this type of regulation should be to verify that the terms or conditions are the minimum necessary to achieve the purposes for which the funds were appropriated. They should not contain conditions in pursuit of goals that are not germane to the purpose for which the funds were authorized and appropriated. Beyond controls to prevent abuse and to ensure that funds appropriated to achieve a specific purpose are channeled efficiently toward that end, maximum discretion should be allowed in the use of Federal funds, particularly when the recipient is a State or local government.

IV. RATIONALE FOR CHOOSING THE PROPOSED REGULATORY ACTION

The RIA should include an explanation of the reasons for choosing the selected regulation. Ordinarily, the regulatory alternative selected should be the one that achieves the greatest net benefits. If legal constraints prevent this choice, they should be identified and explained, and their net cost should be estimated.

Where uncertainties are substantial or a large proportion of benefits cannot be monetized, other methods of summarizing the benefit-cost analysis may sometimes be appropriate. When alternative forms of presentation are used, the objective must continue to be the maximization of net benefits (except where prohibited by law). Alternative criteria must be used with care because of the potential for errors or misinterpretation.

Agencies need not calculate the internal rate of return for a regulation. The internal rate of return is often difficult to compute and is problematical when multiple rates exist. It must not be used as a criterion for choosing between mutually exclusive alternatives. As a criterion for choosing between alternatives that are not mutually exclusive, it has no advantages over the criterion of maximizing the present value of net benefits.

Benefit-cost ratios, if used at all, must be used with care to avoid a common pitfall. It is a mistake to choose among mutually exclusive alternatives by selecting the alternative with the highest ratio of benefits to costs. An alternative with a lower benefit-cost ratio than another may have the higher net benefits. Whether a regulation's benefits are greater (or less) than its costs can be determined by whether its benefit-cost ratio is greater (or less) than one. The benefit-cost ratio may be used as a very simplified indicator of the likely sensitivity of the result: If the benefit-cost ratio is much greater than one, the conclusion that the regulation's benefits exceed its costs probably is not sensitive to likely alternative parameter values. If the ratio is only slightly greater than one, the conclusion probably is sensitive. The benefit-cost ratio may sometimes be acceptable as a rough substitute for genuine sensitivity analysis where it is not feasible to carry out a full sensitivity analysis (e.g., if the number of regulatory parameters to be tested by sensitivity analysis is large). When so used, the benefit-cost ratio should be recognized as only a crude approximation to a genuine sensitivity analysis and the analyst should be aware of its limitations (e.g., the benefit-cost ratio is sensitive to the arbitrary classification of an item as a benefit or an averted cost).

Where the benefits of proposed regulatory alternatives include reductions in fatality risks, an acceptable alternative to direct calculation of net benefits is the indirect approach of calculating incremental costs per life saved between adjacent alternatives. This is done by ranking all the alternatives according to the number of lives they save and then calculating the change in costs and the change in lives saved between each alternative and the one with the next highest number of lives saved. If the alternative selected is the one whose incremental cost per life saved is closest to the willingness-to-pay value of life, this decision criterion is analytically equivalent to that of maximizing net benefit.

In cases where important benefits cannot be assigned monetary values, cost-effectiveness analysis should be used where possible to evaluate alternatives that generate equivalent nonmonetizable benefits. Costs should be calculated net of monetized benefits. Between two alternatives with equivalent nonmonetizable benefits, the alternative with the lower net costs should be selected. Cost-effectiveness analysis should also be used to compare regulatory alternatives in cases where the level of benefits is specified by statute.

V. STATUTORY AUTHORITY

The RIA should include a statement of determination and explanation that the proposed regulatory action is within the agency's statutory authority.

Further Reading

Edith Stokey and Richard Zeckhauser, *A Primer for Policy Analysis*. Chapters 9 and 10 provide a good introduction to basic concepts.

E. J. Mishan, *Economics for Social Decisions: Elements of Cost-Benefit Analysis*. Assumes some knowledge of economics. Chapters 5–8 should be helpful on the important subjects of producers' and consumers' surpluses (not discussed extensively in this guidance document).

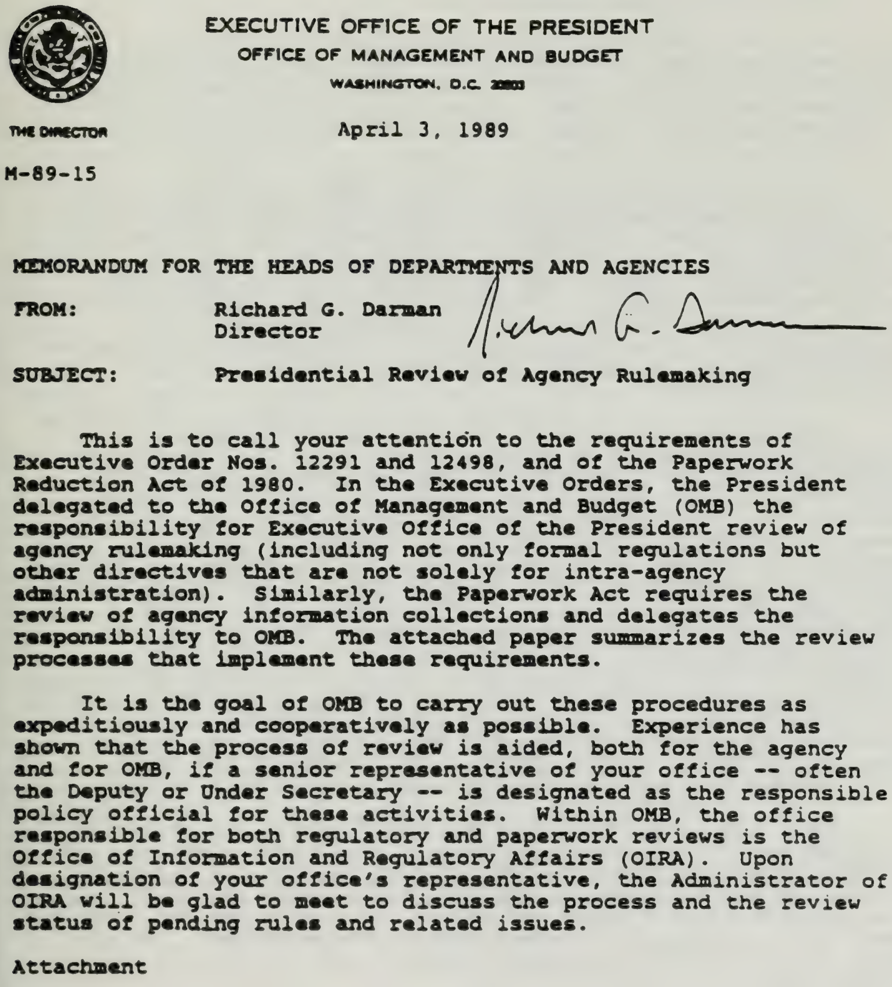
W. Kip Viscusi, *Risk By Choice*. Chapter 6 is a good starting point for the topic of valuing health and safety benefits. Other more technical sources are given in the bibliography.

Robert Cameron Mitchell and Richard C. Carson, *Using Surveys to Value Public Goods: The Contingent Valuation Method*. Provides a valuable discussion on the potential pitfalls associated with the use of contingent-valuation methods.

V. Kerry Smith, Ed., *Advances in Applied Microeconomics: Risk, Uncertainty, and the Valuation of Benefits and Costs*.

Judith D. Bentkover, Vincent T. Covello, and Jeryl Mumpower, Eds., *Benefits Assessment: The State of the Art*.

Office of Management and Budget
MEMORANDUM FOR THE HEADS OF DEPARTMENTS AND AGENCIES
Presidential Review of Agency Rulemaking (April 3, 1989)



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. [illegible]

THE DIRECTOR

April 3, 1989

M-89-15

MEMORANDUM FOR THE HEADS OF DEPARTMENTS AND AGENCIES

FROM: Richard G. Darman
Director

SUBJECT: Presidential Review of Agency Rulemaking

This is to call your attention to the requirements of Executive Order Nos. 12291 and 12498, and of the Paperwork Reduction Act of 1980. In the Executive Orders, the President delegated to the Office of Management and Budget (OMB) the responsibility for Executive Office of the President review of agency rulemaking (including not only formal regulations but other directives that are not solely for intra-agency administration). Similarly, the Paperwork Act requires the review of agency information collections and delegates the responsibility to OMB. The attached paper summarizes the review processes that implement these requirements.

It is the goal of OMB to carry out these procedures as expeditiously and cooperatively as possible. Experience has shown that the process of review is aided, both for the agency and for OMB, if a senior representative of your office -- often the Deputy or Under Secretary -- is designated as the responsible policy official for these activities. Within OMB, the office responsible for both regulatory and paperwork reviews is the Office of Information and Regulatory Affairs (OIRA). Upon designation of your office's representative, the Administrator of OIRA will be glad to meet to discuss the process and the review status of pending rules and related issues.

Attachment

March 1989

IMPLEMENTATION OF EXECUTIVE ORDER NOS. 12291 AND 12498 AND THE PAPERWORK REDUCTION ACT.

I. Executive Order No. 12498.

E.O. No. 12498 requires the Administration annually to publish a Regulatory Program of the United States Government outlining the Administration's regulatory priorities and upcoming important regulatory actions. The Order also creates the annual regulatory planning process that results in the publication of this book.

In a process similar to the fiscal budget process, at the beginning of each year each major regulatory agency drafts its regulatory program -- a summary of its regulatory policies, and a list of specific regulatory development projects underway. These draft regulatory programs are reviewed by OMB for consistency with the Administration's regulatory principles and priorities, and the planned actions of other regulatory agencies. If a planned regulatory action is consistent with these principles and priorities, then the action is included in the published Regulatory Program.

The next Regulatory Program, covering the regulatory activities of 26 agencies for the period April 1, 1989 through March 31, 1990, will provide the Congress and the public with descriptions and timetables for these significant regulatory actions. The rulemaking actions could be preliminary, in the sense of studies or other activities intended to lead to a decision of whether to undertake a rulemaking, as well as those underway as proposed or final rules. The 1989 Regulatory Program also provides agency heads an opportunity to focus on the upcoming work of their agencies, determine agency goals and regulatory priorities, and determine whether a particular regulatory action is worth starting before committing agency resources to it. Under the Executive Order, if an agency later requests OMB review of an important draft proposed or final rule that was not included in the 1989 Regulatory Program, but that should have been, OMB may return it to the agency for further work and for inclusion in the next year's Regulatory Program.

Note: Agencies were to submit their draft 1989 regulatory programs for OMB review by January 9, 1989. Most agencies have already submitted them. New agency heads and policy officials should review these submissions, and revise them as may be necessary to reflect their regulatory strategies for the upcoming year; at the request of a newly-appointed agency head, OMB will defer final review to provide reasonable opportunity for agency reassessment.

II. Executive Order No. 12291.

E.O. No. 12291 establishes Presidential oversight of agency rulemaking, requiring review of regulatory actions before they are proposed for public comment, and again before they are issued in final form. The Order defines "regulation" or "rule" broadly to include all agency policy guidance that affects the public, including procurement practice, grant or loan procedures, guidance to the public, interpretations of rules and statutes, and regulatory actions that relate to international trade.

Following transmittal to OMB by the head of the agency of a draft proposed rule, generally called a notice of proposed rulemaking, OMB reviews this draft proposed rule for consistency with the regulatory principles stated in the Order. The review includes assessing whether the rule is based on adequate information concerning the need for and consequences of the proposed government action; whether the potential benefits to society of the regulation outweigh its costs; whether the regulatory objectives are chosen to maximize the net benefits to society; and whether the regulatory alternative chosen involves the least net cost to society. Additional guidance for review was promulgated by the Presidential Task Force on Regulatory Relief in August 1983.

An important part of OMB review of the draft rule includes evaluation for possible impact on the programs of other agencies. OMB arranges for review by affected agencies, and for the coordination of agency positions as necessary.

If the rule is a "major" rule as defined by the Executive Order (i.e., a rule likely to result in an impact of $100 million or more annually, a major increase in costs or prices, or significant adverse effects on competition, employment, investment, productivity or a particular industry, or as otherwise designated by OMB), the agency must prepare a written analysis called a Regulatory Impact Analysis (RIA). The RIA must contain an analysis of the rule's full social impact, including its costs and benefits. This is submitted to OMB along with the applicable draft rule. The preparation of this Regulatory Impact Analysis is important to assist the agency head in evaluating the need for and consequences of possible Federal action and in selecting from alternate ways to structure the rule, and to provide OMB and the public with a broader understanding of the scope of the issues that may be involved. OMB published detailed draft Regulatory Impact Analysis guidance in the 1988 Regulatory Program.

In the course of its review of the proposed rule (and the accompanying RIA, where applicable), OMB works closely with the agency. When OMB has completed its review of a proposed rule, OMB notifies the agency that it has concluded review. After receiving notification from OMB that it has concluded review, the agency may proceed to issue the proposed rule.

Following publication of the proposed rule, the agency receives and reviews the public comments. After it drafts the rule in its final form, the draft final rule is submitted to OMB for review in much the same fashion as the draft proposed rule, and a similar review process is conducted. In the case of regulations subject to statutory or judicial deadlines, OMB will not unilaterally delay publication beyond the deadline. In such cases it is incumbent upon the agency to submit the rule to OMB in a timely fashion, so as to provide a meaningful opportunity for Executive Office review. When necessary due to delays in agency clearance procedures, the draft rule should be submitted to OMB for preliminary review at the same time as it is being reviewed by the agency's senior policymakers.

III. Paperwork Reduction Act.

The Paperwork Reduction Act of 1980 (44 U.S.C. chapter 35) requires that OMB approve all collections of information by an agency before they can be implemented. A collection of information includes (1) requests for information, written or oral, for transmission to the government, and (2) requests that one party disclose information to another. Many information collections and recordkeeping requirements are contained or authorized by regulations as monitoring or enforcement tools, while others appear in written questionnaires and their accompanying instructions. The Act's underlying goal is to minimize the Federal paperwork burden on the public. At the same time, the Act recognizes the importance of information to the successful completion of agency missions, and charges OMB with the responsibility of weighing the burdens of the collection on the public against the needs of the agency.

Agencies must justify, in writing, to OMB and to the public each proposed collection of information, and include estimates of the reporting burden on respondents. In submitting a clearance request to OMB, an agency must demonstrate that the collection of information is the least burdensome way of obtaining information necessary for the proper performance of its functions, that the collection is not duplicative of others, and that the collection has practical utility.

To alert the public, agencies must publish a notice in the Federal Register of the agency's submission to OMB of a request for approval and, in certain circumstances, publish the draft information collection itself. The public -- during OMB's review and at any other time -- is to have full opportunity to make its views known concerning any Federal data collection, both as to its perceived need and the reporting burdens involved.

Under the Act, OMB approval for an agency to use each data collection instrument can last a maximum of three years. Failure to obtain OMB approval means that the requirement for the public to provide the data collection is without legal force, and that an agency may not subject the respondent to any penalty for failure to comply with the request for information.

Attorney General's Manual

on the

Administrative Procedure Act

Prepared by the
United States Department of Justice
TOM C. CLARK
Attorney General

1947

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INTRODUCTION

June 11, 1946, the date on which the Administrative Procedure Act was approved by President Truman, is notable in the history of the governmental process. The Act sets a pattern designed to achieve relative uniformity in the administrative machinery of the Federal Government. It effectuates needed reforms in the administrative process and at the same time preserves the effectiveness of the laws which are enforced by the administrative agencies of the Government. The members of the Seventy-Ninth Congress who worked so assiduously on the McCarran-Sumners-Walter bill showed statesmanship and wisdom in dealing with the difficult problems thus presented.

The Department of Justice played an active role in the development of the Administrative Procedure Act. In 1938, at a time when there was criticism of Federal administrative agencies, Homer Cummings, as Attorney General, suggested to the late President Roosevelt that the Department of Justice be authorized to conduct a full inquiry into the administrative process. In response to this suggestion, President Roosevelt requested Attorney General Cummings to appoint a committee to make a thorough study of existing administrative procedures and to submit whatever recommendations were deemed advisable. For this purpose the Attorney General appointed a committee of eminent lawyers, jurists, scholars and administrators.

For a period of two years this committee, known as the Attorney General's Committee on Administrative Procedure, devoted itself to the study of the administrative process. Its work culminated in the issuance of 27 monographs on the operations of the more important Government agencies it had investigated, as well as in a Final Report to the President and to the Congress. This Final Report is a landmark in the field of administrative law. In fact, the main origins of the present Administrative Procedure Act may be found in that Report, and in the so-called majority and minority recommendations submitted by the Committee. These recommendations were the subject of extensive hearings held before a subcommittee of the Senate Committee on the Judiciary in 1941.

There was a lull in legislative activities in the field of administrative law during the next few years by reason of the impact of war. But when Congress in 1945 resumed consideration of legislation in this field, the Chairmen of both the Senate and House Committees on the Judiciary called upon this Department for its assistance. The invitation was accepted, and the task was assigned to the Office of the Assistant Solicitor General. For many months the members of that Office assisted in the drafting and revision of the bill (S. 7) which developed into the Administrative Procedure Act.

Finally, in a letter dated October 19, 1945, to the Chairmen of both Committees on the Judiciary, I endorsed S. 7 as revised. I concluded that "The bill appears to offer a hopeful prospect of achieving reasonable uniformity and fairness in administrative procedures without at the same time interfering unduly with the efficient and economical operation of the Government." Sen. Rep. 752, 79th Cong., 1st sess., pp. 37-38. The bill then moved in regular course through both Committees with a few minor modifications (H.R. Rep. 1980, 79th Cong., 2nd sess., p. 57). It was subsequently adopted by both Houses of Congress without a dissenting vote.

After the Administrative Procedure Act was signed by President Truman on June 11, 1946, it became evident that a major phase of our work had just begun. Government agencies were calling upon us for advice on the meaning of various provisions of the Act. We endeavored to furnish that advice promptly and in detail to every agency which consulted us. At length I decided that we could offer a definite service by preparing a general analysis of the provisions of the Act in the light of our experience. This manual is the result of that effort. It does not purport to be exhaustive. It was intended primarily as a guide to the agencies in adjusting their procedures to the requirements of the Act.

George T. Washington, the Assistant Solicitor General, was assigned the tasks I have just described—both the rendition of advice to the agencies and the preparation of the manual. He had assisted in drafting the Act and was familiar with the administrative problems of the agencies. Two members of his staff, Robert Ginnane and David Reich, took the major burden of the work, under the supervision and direction of Mr. Washington and myself. The manner in which the task has been carried out has my full approval.

While the manual was intended originally for distribution only to Government agencies, public demand for it has been so great that I have decided to make it generally available. I trust that it will prove helpful to those who find a need for it.

A word of explanation as to the manner in which the manual is arranged should be helpful. It has been prepared mainly on a section by section analysis of the Act. Each of the major sections is treated in a separate chapter. There has been no separate treatment of section 11, covering the appointment of examiners, since the Civil Service Commission is entrusted with the responsibilities under that section and is presently engaged in working out the necessary requirements, assisted by an Advisory Committee of experts designated by the Commission. No chapter as such is being devoted to either section 2 (definitions) or to section 12 (construction and effect) for the reason that by themselves they have little meaning except in connection with the functional aspects of the Act. However, there is a separate chapter on two important phases of section 2, namely, the coverage of the Act and the fundamental distinction between rule making and adjudication.

Tom C. Clark
Attorney General

August 27, 1947

NOTE CONCERNING MANNER OF CITATION OF LEGISLATIVE MATERIAL

The legislative history of the Administrative Procedure Act really begins with the Final Report of the Attorney General's Committee on Administrative Procedure (cited hereinafter as Final Report). This Report led to the introduction in Congress of the so-called majority and minority bills, respectively designated as S. 675 and S. 674, 77th Cong., 1st sess. These bills, together with S. 918, formed the basis for the extensive and valuable hearings held in 1941 before a subcommittee of the Senate Committee on the Judiciary (cited hereinafter as Senate Hearings (1941)). In 1945,the House Committee on the Judiciary held brief hearings (cited hereinafter as House Hearings (1945)) on various administrative procedure bills, of which H.R. 1203, 79th Cong., 1st sess., was the precursor of the present Act. Also in June 1945, the Senate Committee on the Judiciary issued a comparative print, with comments, which is an essential part of the legislative history. The Committee reports on the Act are Sen. Rep. 752, 79th Cong., 1st sess. (cited hereinafter as Sen. Rep.). and H.R. Rep. 1980, 79th Cong., 2nd sess. (cited hereinafter as H.R. Rep.). In October 1945, the Attorney General, at the request of the Senate Committee on the Judiciary, submitted a letter, with memorandum attached, setting forth the understanding of the Department of Justice as to the purpose and meaning of the various provisions of the bill (S. 7). This letter and memorandum constitute Appendix B of the Senate Committee Report and have been printed as Appendix B to this manual.

There may be obtained from the Government Printing Office Sen. Doc. No. 248, 79th Cong., 2nd sess., entitled "Administrative Procedure Act—Legislative History" (cited hereinafter as Sen. Doc.), which contains the Senate and House debates on the Administrative Procedure Act, together with all the documents mentioned above, except the Final Report of the Attorney General's Committee on Administrative Procedure and the Senate Hearings (1941). Wherever appropriate, there will be two citations, one to the particular report or hearing in which the legislative material appears, the other a parenthetical reference to the corresponding page in the Senate Document.

I

FUNDAMENTAL CONCEPTS

a. *Basic Purposes of the Administrative Procedure Act*

The Administrative Procedure Act may be said to have four basic purposes:

1. To require agencies to keep the public currently informed of their organization, procedures and rules (sec. 3).

2. To provide for public participation in the rule making process (sec. 4).

3. To prescribe uniform standards for the conduct of formal rule making (sec. 4(b) and adjudicatory proceedings (sec. 5), i.e., proceedings which are required by statute to be made on the record after opportunity for an agency hearing (secs. 7 and 8).

4. To restate the law of judicial review (sec. 10).

b. *Coverage of the Administrative Procedure Act*

The Administrative Procedure Act applies, with certain exceptions to be discussed, to every agency and authority of the Government. Section 2(a) of the Act reads, in part, as follows:

> "Agency" means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia. Nothing in this Act shall be construed to repeal delegations of authority as provided by law.

It will be seen from the above that agency is defined as each authority of the Government of the United States, whether or not within or subject to review by another agency. This definition was adopted in recognition of the fact that the Government is divided not only into departments, commissions, and offices, but that these agencies, in turn, are further subdivided into constituent units which may have all the attributes of an agency insofar as rule making and adjudication are concerned.[1] For example, the Federal Security Agency is composed of many authorities which, while subject to the overall supervision of that agency, are generally independent in the exercise of their functions. Thus, the Social Security Administration within the Federal Security Agency is in complete charge of the Unemployment Compensation provisions of the Social Security Act. By virtue of the definition contained in section 2(a) of the Administrative Procedure Act, the Social Security Administration is an agency, as is its parent organization, the Federal Security Agency.

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[1] The legislative history of section 2(a) illustrates clearly the broad scope of the term "agency." In the Senate Comparative Print of June 1945, the term agency was explained as follows (p. 2): "It is necessary to define agency as 'authority' rather than by name or form, because of the present system of including one agency within another or of authorizing internal boards or 'divisions' to have final authority. 'Authority' means any officer or board, whether within another agency or not, which by law has authority to take final and binding action with or without appeal to some superior administrative authority. Thus, 'divisions' of the Interstate Commerce Commission and the judicial officers of the Department of Agriculture would be 'agencies' within this definition." (Sen. Doc. p. 13). And in the Senate Report the following appears at page 10: "The word 'authority' is advisedly used as meaning whatever persons are vested with powers to act (rather than the mere form of agency organization such as department, commission, board, or bureau) because the real authorities may be some subordinate or semidependent person or persons within such form of organization." (Sen. Doc. p. 196). See also H.R. Rep. p. 19 (Sen. Doc. p. 253).

The Administrative Procedure Act applies to every authority of the Government of the United States other than Congress, the courts, the governments of the possessions, Territories, and the District of Columbia (sec. 2(a)). The term "courts" is not limited to constitutional courts, but includes the Tax Court, the Court of Customs and Patent Appeals, the Court of Claims, and similar courts. Sen. Rep. p. 38 (Sen. Doc. p. 408).

While the Administrative Procedure Act covers generally all agencies of the United States, certain agencies and certain functions are specifically exempted from all the requirements of the Act with the exception of the public information requirements of section 3. Section 2(a) states, in part: "Except as to the requirements of section 3, there shall be excluded from the operation of this Act (1) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them, (2) courts martial and military commissions, (3) military or naval authority exercised in the field in time of war or in occupied territory, or (4) functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947, and the functions conferred by the following statutes: Selective Training and Service Act of 1940; Contract Settlement Act of 1944; Surplus Property Act of 1944; Sugar Control Extension Act of 1947;[2] Veterans' Emergency Housing Act[3] of 1946; and the Housing and Rent Act of 1947.[4]"

It will be helpful to consider each of these exceptions separately:

(1) "agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them." This definition is intended to embrace such agencies as the National Railroad Adjustment Board, composed

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[2] This exception was added by Public Law 30, 80th Cong., 1st sess.
[3] This exception was added by Public Laws 663 and 719, 79th Cong., 2d sess.
[4] This exception was added by Public Law 129, 80th Cong., 1st sess.

of representatives of employers and employees. In addition, it includes agencies which have a tripartite composition in that they are composed of representatives of industry, labor and the public, such as the Railroad Retirement Board and special fact finding boards. H.R. Rep. p. 19 (Sen. Doc. p. 253); 92 Cong. Rec. 2152, 5649 (Sen. Doc. pp. 307, 355). The exemption, it will be seen, is not limited to boards which convene only occasionally, with per diem compensation, to determine, arbitrate or mediate particular disputes, but also includes similar boards or agencies composed wholly or partly of full-time paid officers of the Federal Government.

(2) "courts martial and military commissions."

(3) "military or naval authority exercised in the field in time of war or in occupied territory."

(4) "functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947, and the functions conferred by the following statutes: Selective Training and Service Act of 1940; Contract Settlement Act of 1944; Surplus Property Act of 1944; Sugar Control Extension Act of 1947; Veterans' Emergency Housing Act of 1946; and the Housing and Rent Act of 1947." The functions thus exempted on the ground of their temporary nature may be classified, as to their termination, as follows:

(a) "On the termination of present hostilities"—A considerable number of statutes authorizing wartime programs and controls limit the duration of these functions by such phrases as "in time of war", "for the duration of the war", "upon cessation of hostilities as proclaimed by the President", "upon the termination of the unlimited national emergency proclaimed by the President on May 27, 1941", etc. It is clear from the legislative history of section 2(a) that the exemption is not to be limited to functions derived from statutes which provide for expiration "on the termination of present hostilities" *sic*, but rather extends to all functions which are limited as to duration by phrases such as those quoted above. House Hearings (1945) pp. 36-37 (Sen. Doc. pp. 82-83); 92 Cong. Rec., 5649 (Sen. Doc. p. 355). It is also clear that this exemption for temporary war functions is in no way affected by the circumstance that they may be continued in existence for a considerable period of time after combat operations have ceased. It is well established that statutes authorizing such temporary agencies and functions remain in effect until a formal state of peace is restored or some earlier termination date is made effective by appropriate governmental action. See *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146 (1919) ; and the Attorney General's letter to the President, dated September 1, 1945, in H.R. Doc. 282, 79th Cong., 1st sess., p. 49. The conclusion that the exemption is not measured by the duration of actual combat operations is confirmed by the fact that this Act, containing the exemption, did not become law until June 11, 1946.

(b) "Within any fixed period thereafter (after the termination of present hostilities)"—This phrase provides exemption for functions which terminate, for example, "six months after the termination of the unlimited national emergency proclaimed by the President on May 27, 1941." It is unnecessary to repeat the discussion under (a), *supra,* as the meaning of the phrase "termination of present hostilities."

(c) "On or before July 1, 1947"—This encompasses such functions as expire on or before that date.

(d) The functions conferred by the Selective Training and Service Act of 1940, the Contract Settlement Act of 1944, the Surplus Property Act of 1944, the Veterans' Emergency Housing Act of 1946, the Sugar Control Extension Act of 1947 and the Housing and Rent Act of 1947 are specifically exempted, regardless of their expiration date. Thus the War Assets Administration, insofar as its functions are derived from the Surplus Property Act, is not subject to the provision of the Act, with the exception of section 3.

The foregoing agencies and functions have been specifically exempted from all the provisions of the Act with the exception of section 3. This means, in effect, that the rule making provisions of section 4, the adjudication provisions of section 5, and the judicial review provisions of section 10 are not applicable to them. These broad exceptions, accordingly, must be borne in mind in connection with the discussion of the other sections of the Act. Specific exceptions to various sections will be noted in the discussion of such sections.

c.—*Distinction Between Rule Making and Adjudication*

The Administrative Procedure Act prescribes radically different procedures for rule making and adjudication. Accordingly, the proper classification of agency proceedings as rule making or adjudication is of fundamental importance.

"Rule" and "rule making", and "order" and "adjudication" are defined in section 2 as follows:

> (c) *Rule and rule making.* "Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, cost, or accounting, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.
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> (d) *Order and adjudication.* "Order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. "Adjudication" means agency process for the formulation of an order.
>
> (e) *License and licensing.* "License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission. "Licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license.

Since the definition of adjudication is largely a residual one, i.e., "other than rule making but including licensing", it is logical to determine first the scope of rule making. The definition of rule is not limited to substantive rules, but embraces interpretative, organizational and procedural rules as well.[5] Of particular importance is the fact that "rule" includes agency statements not only of general applicability but also those of particular applicability applying either to a class or to a single person. In either case, they must be of *future effect,* implementing or prescribing future law. Accordingly, the approval of a corporate reorganization by the Securities and Exchange Commission, the prescription of future rates for a single named utility by the Federal Power Commission, and similar agency actions, although applicable only to named persons, constitute rule making. H.R. Rep. p. 49, fn. 1 (Sen. Doc. p. 283).

As applied to the various proceedings of Federal agencies, the definitions of "rule" and "rule making", and "order" and "adjudication" leave many questions as to whether particular proceedings are rule making or adjudication. For example, the question arises whether agency action on certain types of applications is to be deemed rule making or licensing (adjudication), in view of the fact that there is apparent overlapping between the definition of "rule" in section 2(c) and of "license" in section 2(e). Thus, "rule" includes the "approval * * * for the future * * *", and "license" is defined to include "any agency permit, certificate, approval * * * or other form of permission."

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[5] Note that section 4 (apart from 4(d)) is applicable only to substantive rules, i.e., rules issued pursuant to statutory authority to implement statutory policy, as by fixing rates or defining standards.

An obvious principle of construction is that agency proceedings which fall within one of the specific categories of section 2(c), e.g., determining rates for the future, must be regarded as rule making, rather than as coming under the general and residual definition of adjudication. Furthermore, the listing of specific subjects in section 2 (c) as rule making is not intended to be exclusive. It is illustrative only. H.R. Rep. 20 (Sen. Doc. p. 254). Thus, in determining whether agency action on a particular type of application is "rule making", the purposes of the statute involved and the considerations which the agency is required to weigh in granting or withholding its approval will be relevant; if the factors governing such approval are the same, for example, as the agency would be required to apply in approving a recapitalization or reorganization (clearly rule making), this circumstance would tend to support the conclusion that agency action on such an application is rule making.

More broadly, the entire Act is based upon a dichotomy between rule making and adjudication. Examination of the legislative history of the definitions and of the differences in the required procedures for rule making and for adjudication discloses highly practical concepts of rule making and adjudication. Rule making is agency action which regulates the future conduct of either groups of persons or a single person; it is essentially legislative in nature, not only because it operates in the future but also because it is primarily concerned with policy considerations. The object of the rule making proceeding is the implementation or prescription of law or policy for the future, rather than the evaluation of a respondent's past conduct. Typically, the issues relate not to the evidentiary facts, as to which the veracity and demeanor of witnesses would often be important, but rather to the policy-making conclusions to be drawn from the facts. Senate Hearings (1941) pp. 657, 1298, 1451. Conversely, adjudication is concerned with the determination of past and present rights and liabilities. Normally, there is involved a decision as to whether past conduct was unlawful, so that the proceeding is characterized by an accusatory flavor and may result in disciplinary action. Or, it may involve the determination of a person's right to benefits under existing law so that the issues relate to whether he is within the established category of persons entitled to such benefits. In such proceedings, the issues of fact are often sharply controverted. Sen. Rep. p. 39 (Sen. Doc. p. 225); 92 Cong. Rec. 5648 (Sen. Doc. p. 353).

Not only were the draftsmen and proponents of the bill aware of this realistic distinction between rule making and adjudication, but they shaped the entire Act around it. Even in formal rule making proceedings subject to sections 7 and 8, the Act leaves the hearing officer entirely free to consult with any other member of the agency's staff. In fact, the intermediate decision may be made by the agency itself or by a responsible officer other than the hearing officer. This reflects the fact that the purpose of the rule making proceeding is to determine policy. Policy is not made in Federal agencies by individual hearing examiners; rather it is formulated by the agency heads relying heavily upon the the expert staffs which have been hired for that purpose. And so the Act recognizes that in rule making the intermediate decisions will be more useful to the parties in advising them of the real issues in the case if such decisions reflect the views of the agency heads or of their responsible officers who assist them in determining policy. In sharp contrast is the procedure required in cases of adjudication subject to section 5(c). There the hearing officer who presides at the hearing and observes the witnesses must personally prepare the initial or recommended decision required by section 8. Also, in such adjudicatory cases, the agency officers who performed investigative or prosecuting functions in that or a factually related case may not participate in the making of decisions. These requirements reflect the characteristics of adjudication discussed above.

The foregoing discussion indicates that the residual definition of "adjudication" in section 2(d) was intended to include such proceedings as the following:

1. Proceedings instituted by the Federal Trade Commission and the National Labor Relations Board leading to the issuance of orders to cease and desist from unfair methods of competition or unfair labor practices, respectively.
2. The determination of claims for money, such as compensation claims under the Longshoremen's and Harbor Workers' Compensation Act, and claims under Title II (Old Age and Survivors' Insurance) of the Social Security Act.

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3. Reparation proceedings in which the agency determines whether a shipper or other consumer is entitled to damages arising out of the alleged *past* unreasonableness of rates.
4. The determination of individual claims for benefits, such as grants-in-aid and subsidies.
5. Licensing proceedings, including the grant, denial, renewal, revocation, suspension, etc. of, for example, radio broadcasting licenses, certificates of public convenience and necessity, airman certificates, and the like.

II

SECTION 3—PUBLIC INFORMATION

The purpose of section 3 is to assist the public in dealing with administrative agencies by requiring agencies to make their administrative materials available in precise and current form. Section 3 should be construed broadly in the light of this purpose so as to make such material most useful to the public. The public information requirements of section 3 do not supersede the Federal Register Act (44 U.S.C. 301 *et seq.*). They are to be integrated with the existing program for publication of material in the Federal Register and the Code of Federal Regulations. The Federal Register Regulations (11 F.R. 9833) govern the manner in which documents are to be prepared prior to submission to the Division of the Federal Register. All materials issued under section 3(a) of the Act will be included in the Code of Federal Regulations and should be prepared accordingly. The Division of the Federal Register is prepared to offer assistance to the agencies in this respect.

AGENCIES SUBJECT TO SECTION 3

This section, unlike the other provisions of the Act, is applicable to all agencies of the United States, excluding Congress, the courts, and the governments of the Territories, possessions, and the District of Columbia. Every agency, whether or not it has rule making or adjudicating functions, must comply with this section. Section 2(a), defining agencies, states specifically that even the exemption for the functions enumerated in the last sentence of that section does not extend to section 3. Accordingly, agencies performing temporary war functions must comply with this section.

EXCEPTIONS TO REQUIREMENTS OF SECTION 3

Two exceptions have been made to section 3, namely:

"(1) *Any function of the United States requiring secrecy in the public interest.*" This would include the confidential operations of any agency, such as the confidential operations of the Federal Bureau of Investigation and the Secret Service and, in general, those aspects of any agency's law enforcement procedures the disclosure of which would reduce the utility of such procedures. It is not restricted, however, to investigatory functions. The Comptroller of the Currency, for example, may have occasion to issue rules to national banks under such circumstances that the public interest precludes publicity.

It should be noted that the exception is made only "to the extent" that the function requires secrecy in the public interest. Such a determination must be made by the agency concerned. To the extent that the function does not require such secrecy, the publication requirements apply. Thus, the War Department obviously is not required to publish confidential matters of military organization and operation, but it would be required to publish the organization and procedure applicable to the ordinary civil functions of the Corps of Engineers.

"(2) *Any matter relating solely to the internal management of an agency.*" This exception is in line with the spirit of the public information requirements of section 3. If a matter is solely the concern of the agency proper, and therefore does not affect the members of the public to any extent, there is no requirement for publication under section 3. Thus, an agency's internal personnel and budget procedures need not be published (e.g., rules as to leaves of absence, vacation, travel, etc.). However, in case of doubt as to whether a matter is or is not one of internal management, it is suggested that the matter be published in the Federal Register, assuming it does not require secrecy in the public interest.

"Internal management of an agency" should not be construed as intra-agency only; it includes functions of internal Federal management, such as most of the functions of the Bureau of the Budget, and interdepartmental committees which are established by the President for the handling of internal management problems.

It should be understood that the following discussion of the requirements of section 3 is not applicable to the above italicized functions since they are expressly exempted from the section.

EFFECTIVE DATE—PROSPECTIVE OPERATION

Section 3, which took effect on September 11, 1946, is prospective in operation. 92nd Cong. Rec. 5650 (Sen. Doc. p. 357). It has no application to materials issued prior to that date. To the extent that an agency's procedures and organization had been published theretofore in the Federal Register (for example, formal rules of practice), it was not necessary to republish them. Appropriate citations were frequently made to such previously published materials. Under section 3(a)(3), publication in the Federal Register is required of substantive rules (and statements of general policy and interpretations formulated and adopted by the agency for the guidance of the public) issued on and after September 11, 1946.

The Federal Register of September 11, 1946, Part II, appearing in four sections and containing 966 pages, contains the material prepared by Government agencies in initial compliance with section 3.

SECTION 3(a)—RULES

Section 3(a) directs each agency to "separately state and currently publish in the Federal Register" its organization, procedures and substantive rules.

SEPARATE STATEMENT

The three classes of material—organizational, procedural, and substantive rules—must be published in the Federal Register under separate and appropriate headings. Such separate statement, however, should not be carried to so logical an extreme as to inconvenience the public. For example, if an agency grants public benefits, it would be proper to include in the substantive rules relative to those benefits a statement as to the form to be used in applying for such benefits and the place of filing; however, the same procedural information must also be set forth or referred to in the separate statement of the agency's procedure. This may be accomplished by inserting in the procedural statement a notation to the effect that the procedure for obtaining public benefits may be found at a designated part of the substantive rules relative to such benefits.

DESCRIPTION OF ORGANIZATION

Section 3(a)(1) requires that every agency shall separately state and currently publish in the Federal Register "(1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests." It is only delegations of *final* authority which need be listed. In this connection, it should be noted that there is no requirement to list in the rules the names of specific individuals to whom power is delegated, unless such specific designation is otherwise required by law, nor is there any requirement that isolated instances of delegation made on an *ad hoc* basis be published. Senate Hearings (1941) p. 1329. However, the agency should list by title the offices or officers to whom definite delegations of final authority have been made (e.g., Claims Division of the Department of Justice, or Regional Director of the War Assets Administration). Under this subsection, it may be advisable also for agencies to state specifically the powers which may be exercised by persons serving in an "acting" capacity.

An agency's central organization should be described by listing its divisions and principal subdivisions and the functions of each. Field organizations should be described by listing the location of such offices, together with a statement of their functions. For example, if certain field offices have authority to issue interpretative or advisory opinions, this should be specified together with a statement as to whether such opinions are subject to review or confirmation by the agency's central or other office. In general, there should be a statement of the information which may be obtained from, and the applications or requests which may be filed with, the different field offices. In view of the last sentence of section 3(a), it is important that each agency state clearly the types of applications, etc., if any, which it requires to be filed with designated agency offices.

STATEMENT OF PROCEDURES

Section 3(a)(2) provides that every agency shall separately state and currently publish in the Federal Register "(2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations." This subsection is primarily concerned with the procedures by which an agency discharges its public functions —such as rule making, adjudication, and the administration of loan, grant and benefit programs. No categorical statement can be made as to the manner in which each agency should describe "the general course and method by which its functions are channeled and determined."

Section 3 does not require an agency to "freeze" its procedures, nor does it force the adoption of procedures more formal than those previously prevailing. An agency need not invent procedures where it has no reason to establish any procedures. Senate Hearings (1941) p. 1337. However, the agency must, in accordance with section 3, keep the public currently informed of changes in the actual procedures available. Of course, the published procedures of the agency may provide (subject to applicable law) for emergency or exceptional cases.

Where there is an established procedure for the handling of certain functions, the routing of and responsibility for such functions may be stated with reasonable particularity. Some functions, however, may be exercised so seldom that it will not be practicable to prescribe a definite routine. In such cases, the published information should at least include a statement of the office to which inquiries may be directed.

In brief, section 3 (a) (2) requires an agency to disclose in general terms, designed to be realistically informative to the public, the manner in which its functions are channeled and determined. In this connection, it should be remembered that matters of internal management are exempted from the publication requirements of section 3.

Informal conference procedures used by an agency should be publicized with a view to both serving the convenience of the public and facilitating the agency's operations. Such procedures exist widely and are known to the specialized practitioners. The general public should be informed of their availability and as to how and where to take advantage of them.

Forms for application, registration, etc., and the instructions accompanying such forms need not be published in full; publication of a simple statement of the function and contents of the form, and of where copies of the form, if available, may be obtained, is sufficient. H.R. Rep. p. 22 (Sen. Doc. p. 256).

Attention is called to the last sentence of the section, stating "No person shall in any manner be required to resort to organizaion or procedure not so published." Should an agency fail to publish, for example, a listing of its field offices with their functions, persons who have not received actual notice of such agency organization may contend that they are not bound to resort to a field office prior to institution of their case in the central office.

SUBSTANTIVE RULES

Section 3(a) (3) provides that every agency shall separately state and currently publish in the Federal Register "(3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law." This exemption for "rules addressed to and served upon named persons in accordance with law" is designed to avoid filling the Federal Register with a great mass of particularized rule making, such as schedules of rates, which have always been satisfactorily handled without general publication in the Federal Register.

The phrase "substantive rules adopted as authorized by law" refers, of course, to rules issued by an agency to implement statutory policy. Examples are the Federal Power Commission's rules prescribing uniform systems of accounts and proxy rules issued by the Securities and Exchange Commission.

Statements of general policy and interpretations need be published only if they are formulated and adopted by the agency for the guidance of the public. The Act leaves each agency free to determine for itself the desirability of formulating policy statements for the guidance of the public. To the extent that an agency, however, enunciates such statements of general policy in the form of speeches, releases or otherwise, the Act requires them to be published in the Federal Register.

The term "public" would not seem to embrace states. For example, the Federal Security Agency sends interpretative guides to states to assist them in complying with the requirements of the Unemployment Compensation provisions of the Social Security laws. Such guides need not be published since they are not for the use of the "public" but only for the state governments.

Section 3(a) does not require publication in the Federal Register of statements of agency policy and interpretations which are developed and enunciated only in the course of adjudicatory orders and opinions; such orders and opinions are treated as a separate and distinct body of administrative materials under section 3(b).

An advisory interpretation relating to a specific set of facts is not subject to section 3. 92 Cong. Rec. 5649 (Sen. Doc. p. 355). For example, a reply from the agency's general counsel to an inquiry from a member of the public as to the applicability of a statute to a specific set of facts need not be published.

SECTION 3(b)—OPINIONS AND ORDERS

Section 3(b) provides that "Every agency shall publish or, in accordance with published rule, make available to public inspection all final opinions or orders in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents) and all rules." Section 3(b) does not require publication of these materials in the Federal Register or in any other prescribed form. Regular publication of decisions in bound volumes or bulletins, as many agencies are now doing, will suffice; in such cases, however, the agency should publish a rule stating where copies of such orders and opinions may be obtained or inspected during the interval prior to publication. It should be noted that the materials specified by section 3(b) need not be published at all if, in accordance with the agency's rule published in the Federal Register pursuant to section 3(a)(1), they are available for public inspection. It is suggested that to the extent section 3(b) is complied with by making materials available for inspection, such inspection be made possible, where practicable, in regional offices as well as in the agency's central office.

The scope of the phrase "opinions or orders in the adjudication of cases" is governed by section 2(d) and, accordingly, includes orders or opinions issued with respect to licenses. Adjudicatory orders and opinions which are not "final" need not be published or made available for inspection. However, where intermediate orders and opinions would be useful to the public as, say, procedural precedents, agencies may wish to publish them or make them available for inspection in the same manner as final orders and opinions.

An agency may withhold from publication or inspection final orders and opinions "required for good cause to be held confidential and not cited as precedents." If it is desired, however, to rely upon the citation of confidential materials, the agency should first make available some abstract of the confidential material in such form as will show the principles relied upon without revealing the confidential facts.

The last three words of section 3(b) "and all rules" include "rules addressed to and served upon named persons in accordance with law" which are excluded from the publication requirement of section 3(a)(3). See H.R. Rep. p. 50, fn. 7 (Sen. Doc. p. 284). Thus rules involving corporate mergers and reorganizations where all the parties are served need not be published in the Federal Register pursuant to section 3(a); instead the provisions of section 3(b) apply. It is sufficient, therefore, if such rules are made available for public inspection.

SECTION 3(c)—PUBLIC RECORDS

Section 3(c) provides that "Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found." The introductory saving clause is intended to preserve existing statutory requirements for confidential treatment of certain materials, such as income tax returns.

Each agency should publish in the Federal Register, under 3(a)(1), a rule listing the types of official records in its files, classifying them in terms of whether or not they are confidential in character, stating the manner in which information is available (as by inspection or sale of photostatic copies), the method of applying for information, and by what officials the application will be determined.

The term "official record" is difficult of definition. In general, it may be stated that matters of official record will include (a) applications, registrations, petitions, reports and returns filed by members of the public with the agency pursuant to statute or the agency's rules, and (b) all documents embodying agency actions, such as orders, rules and licenses. In formal proceedings, the pleadings, transcripts of testimony, exhibits, and all documents received in evidence or made a part of the record are "matters of official record."

Section 3 (c) does not purport to define "official record." Each agency must examine its functions and the substantive statutes under which it operates to determine which of its materials are to be treated as matters of official record for the purposes of the section. Indicative of the types of records which are considered official records by Congress are maps, plats, or diagrams in the custody of the Secretary of the Interior (5 U. S. C. 488), records, books or papers in the General Land Office (28 U. S. C. 672), and registration statements filed with the Securities and Exchange Commission under the Securities Act (15 U. S. C. 77f).

The great mass of material relating to the internal operation of an agency is not a matter of official record. For example, intra-agency memoranda and reports prepared by agency employees for use within the agency are not official records since they merely reflect the research and analysis preliminary to official agency action. Intra-agency reports of investigations are, in general, not matters of official record; in addition, they usually involve matters of internal management and, in view of their nature, must commonly be kept confidential.

But even matters of official record need be divulged only to "persons properly and directly concerned." It is clear that section 3(c) is not intended to open up Government files for general inspection. The phrase "persons properly and directly concerned" is descriptive of individuals who have a legitimate and valid reason for seeking access to an agency's records. See *United States ex rel. Stowell* v. *Deming*, 19 F. 2d, 697 (App. D.C., 1927), certiorari denied, 275 U.S. 531. Each agency is the primary judge of whether the person's interest is such as to require it to make its official records available for his inspection.

An agency may treat matters of official record as "confidential for good cause found" and upon that ground refuse to make them available for inspection. Information held "confidential for good cause found" may be either information held confidential by reason of an agency rule issued in advance (for good cause) making specific classes of material confidential, or such information as is held confidential for good cause found under a particular set of facts. The section does not change existing law as to those materials in Government files which have been heretofore treated as confidential. See *Boske* v. *Comingore*, 177 U.S. 459 (1900); *Boehm* v. *United States*, 123 F. 2d, 791, 805 (C.C.A. 8, 1941).

III

SECTION 4—RULE MAKING

In general, the purpose of section 4 is to guarantee to the public an opportunity to participate in the rule making process. With stated exceptions, each agency will be required under this section to give public notice of substantive rules which it proposes to adopt, and to grant interested persons an opportunity to present their views to it. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the provisions of sections 7 and 8 as to hearing and decision will apply in place of the less formal procedures contemplated by section 4(b). With certain exceptions, no substantive rule may be made effective until at least thirty days after its publication in the Federal Register. Section 4 also grants to interested persons the right to petition an agency for the issuance, amendment or repeal of a rule.

EXCEPTIONS

In addition to the agencies and functions exempted by section 2(a), section 4 itself contains two broad exceptions to its requirements.

"(1) *any military, naval, or foreign affairs function of the United States*". The exemption for military and naval functions is not limited to activities of the War and Navy Departments but covers all military and naval functions exercised by any agency. Thus, the exemption applies to the defense functions of the Coast Guard and to the function of the Federal Power Commission under section 202(c) of the Federal Power Act (16 U.S.C. 824a (c)). Sen. Rep. p. 39 (Sen. Doc. p. 225); Senate Hearings (1941) p. 502.

As to the meaning of "foreign affairs function", both the Senate and House reports state: "The phrase 'foreign affairs functions,' used here and in some other provisions of the bill, is not to be loosely interpreted to mean any function extending beyond the borders of the United States but only those 'affairs' which so affect relations with other governments that, for example, public rule making provisions would clearly provoke definitely undesirable international consequences." Sen. Rep. p. 13; H.R. Rep. p. 23 (Sen. Doc. pp. 199, 257). See also Representative Walter's statement to the House, 92 Cong. Rec. 5650 (Sen.

Doc. p. 358). It is equally clear that the exemption is not limited to strictly diplomatic functions, because the phrase "diplomatic function" was employed in the January 6, 1945 draft of S. 7 (Senate Comparative Print of June 1945, p. 6; Sen. Doc. p. 157) and was discarded in favor of the broader and more generic phrase "foreign affairs function". In the light of this legislative history, it would seem clear that the exception must be construed as applicable to most functions of the State Department and to the foreign affairs functions of any other agency.

"(2) *any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts"*. The exemption for matters relating to "agency management or personnel" is self-explanatory and has been considered in the discussion of "internal management" under section 3. The exemption of "any matter relating * * * to public property, loans, grants, benefits, or contracts" is intended generally to cover the "proprietary" functions of the Federal Government. 92 Cong. Rec. 5650 (Sen. Doc. p. 358). It will be helpful to consider the implication of each of these phrases separately.

Public Property. This embraces rules issued by any agency with respect to real or personal property owned by the United States or by any agency of the United States. Thus, the making of rules relating to the public domain, i.e., the sale or lease of public lands or of mineral, timber or grazing rights in such lands, is exempt from the requirements of section 4. The exemption extends, for example, to rules issued by the Tennessee Valley Authority in relation to the management of its properties, and by the Maritime Commission with respect to ships owned by the United States. The term "public property" includes property held by the United States in trust or as guardian; e.g., Indian property. H.R. Rep. p. 23 (Sen. Doc. p. 257).

Loans. This exempts rules issued with respect to loans by such agencies as the Reconstruction Finance Corporation, the Commodity Credit Corporation, and the Farm Credit Administration. It also exempts rules relating to guarantees of loans, such as are made by the Federal Housing Authority and the Veterans Administration, since they are matters relating to public loans.

Grants. Rule making with respect to subsidy programs is exempted from section 4. "Grants" also include grant-in-aid programs under which the Federal Government makes payments to state and local governments with respect to highways, airports, unemployment compensation, etc.

Benefits. This refers to such programs as veterans' pensions and old-age insurance payments.

Contracts. All rules relating to public contracts are exempt from section 4. The exemption extends to wage determinations made by the Labor Department under the Davis Bacon Act (40 U.S.C. 276a et seq.) and the Walsh Healey Act (41 U.S.C. 35-45), as conditions to construction and procurement contracts entered into by the Federal Government. See *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113 (1940).

SECTION 4(a)—NOTICE

Subsections (a) and (b) of section 4 must be read together because the procedural requirements of subsection (b) apply only where notice is required by subsection (a). It is clear that the requirements of "general notice of proposed rule making" apply only to rule making proposed or initiated by an agency; the filing of a petition under section 4 (d) does not require an agency to undertake rule making proceedings in accordance with subsections (a) and (b). H.R. Rep. p. 26 (Sen. Doc. p. 260).

An agency contemplating the issuance of a rule subject to section 4 (a) must publish in the Federal Register a notice of the proposed rule making, "unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law". The reason for the quoted exception is to avoid burdening the Federal Register with notices addressed to particular parties who have been personally served or otherwise have notice. H.R. Rep. p. 51, fn. 8 (Sen. Doc. p. 285). For example, where a proceeding is commenced to establish rates for named carriers or utilities, if a notice complying with section 4(a) is personally served upon such persons, publication in the Federal Register is not required by the subsection.

Contents of notice. In both formal[1] and informal rule making, the required notice, whether published in the Federal Register or personally served, must include the following information:

1. "A statement of the time, place, and nature of public rule making proceedings". While section 4(a) does not specify how much notice must be given by an agency before it may conduct public rule making proceedings, it is presumed that each agency

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[1] As used here, "formal" rule making means those public rule making proceedings which must be conducted in accordance with sections 7 and 8.

will give reasonable notice.[2] In this connection, each agency should take into account the fact that section 4(c) provides that thirty days must ordinarily elapse prior to a rule becoming effective. Accordingly, each agency should schedule its rule making in such fashion that there will be sufficient time for affording interested persons an opportunity to participate in the rule making as well as for insuring final publication of the rule at least thirty days prior to the desired effective date.

The nature of public rule making may vary considerably from case to case. Under section 4(b) each agency, as this memorandum will indicate *infra,* may conduct its rule making by affording interested persons opportunity to submit written data only, or by receiving a combination of written and oral evidence, or by adopting any other method it finds most appropriate for public participation in the rule making process. However, where an agency is required by statute to conduct a hearing and to reach a decision upon the basis of the record made at such hearing, the formal procedures prescribed by sections 7 and 8 must be pursued. Therefore, the notice, required by section 4(a) should specify the procedure to be employed, that is, formal or informal hearings, submission of written statements with or without opportunity for oral argument, etc.

2. "Reference to the authority under which the rule is proposed". The reference must be sufficiently precise to apprise interested persons of the agency's legal authority to issue the proposed rule.

3. "Either the terms or substance of the proposed rule or a description of the subjects and issues involved". Where able to do so, an agency may state the proposed rule itself or the substance of the rule in the notice required by section 4(a). On the other hand, the agency, if it desires, may issue a more general "description of the subjects and issues involved". It is suggested that each agency consider the desirability of using the latter method if publication of a proposed rule in full would unduly burden the Federal Register or would in fact be less informative to the public. In such a case, the agency may inform interested persons that copies of the proposed rule may be obtained from the agency upon request—this, of course, in addition to the "description of the subjects and issues involved" in the Federal Register. Where there is a "description of the subjects and issues

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[2] See section 8 of the Federal Register Act (44 U.S.C. 308) for a general statutory standard of reasonable notice.

involved", the notice should be sufficiently informative to assure interested persons an opportunity to participate intelligently in the rule making process. Final Report, p. 108.

Section 4(a) *and* (b) *applicable only to substantive rules.* The last sentence of section 4(a) exempts from the requirements of section 4(a) and (b), unless otherwise required by statute, "interpretative rules, general statements of policy, rules of agency organization, procedure, or practice". Thus, the rules of organization and procedure which an agency must publish pursuant to section 3(a)(1) and (2) are not ordinarily subject to the requirements of section 4(a) and (b). The further exemption of "interpretative rules" and "general statements of policy" restricts the application of section 4(a) and (b) to substantive rules issued pursuant to statutory authority.[3] See Senate Comparative Print of June 1945, p. 6 (Sen. Doc. p. 19).

Omission of notice and public procedure for good cause. The last sentence of section 4(a) authorizes any agency to omit the notice required by that subsection (and the procedure specified by section 4(b)) "in any situation in which the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest". It should be noted that the reasons for which an agency may dispense with notice under section 4(a) are written in the alternative so that if it is "impracticable" or "unnecessary" or "contrary to the public interest" the agency may dispense with notice. Should this be done, the agency must incorporate in the rule issued its finding of "good cause" and "a brief statement of the reasons therefor". In general, it may be said that a situation is "impracticable" when an agency finds that due and timely execution of its functions would be impeded by the notice otherwise required in section 4 (a). For example, the Civil Aeronautics Board may learn, from an accident investigation, that certain rules as to air safety should be issued or amended without delay; with the safety of the traveling public at stake, the Board could find that notice and public rule making procedures would be "impracticable", and issue its rules immediately. "Unnecessary" refers to the issuance of a minor rule or amendment in which the public is not particularly interested. Senate Hearings (1941) p. 828. "Public interest" connotes a situation in which the interest of the public would be defeated by any requirement of advance notice. For example, an agency may contemplate the issuance of financial controls under such circumstances that advance notice of such rules would tend to defeat their purpose; in such circumstances, the "public interest" might well justify the omission of notice and public rule making proceedings. Senate Hearings (1941) p. 812.

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[3] In this connection, the following working definitions are offered:
Substantive rules—rules, other than organizational or procedural under section 3(a) (1) and (2), issued by an agency pursuant to statutory authority and which implement the statute, as, for example, the proxy rules issued by the Securities and Exchange Commisson pursuant to section 14 of the Securities Exchange Act of 1934 (15 U.S.C. 78 n). Such rules have the force and effect of law.
Interpretative rules—rules or statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers. See Final Report, p. 27; Senate Comparative Print of June 1945, p. 6 (Sen. Doc. p. 18); Senate Hearings (1941) p. 330.
General statements of policy—statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.

SECTION 4(b)—PROCEDURES

Informal rule making. In every case of proposed informal rule making subject to the notice requirements of section 4(a), section 4(b) provides that "the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner." The quoted language confers discretion upon the agency, except where statutes require "formal" rule making subject to sections 7 and 8, to designate in each case the procedure for public participation in rule making. Such informal rule making procedure may take a variety of forms: informal hearings (with or without a stenographic transcript), conferences, consultation with industry committees, submission of written views, or any combination of these. These informal procedures have already been extensively employed by Federal agencies. Final Report, pp. 103-105. In each case, the selection of the procedure to be followed will depend largely upon the nature of the rules involved. The objective should be to assure informed administrative action and adequate protection to private interests.

Each agency is affirmatively required to consider "all relevant matter presented" in the proceeding; it is recommended that all rules issued after such informal proceedings be accompanied by an express recital that such material has been considered. It is entirely clear, however, that section 4(b) does not require the formulation of rules upon the exclusive basis of any "record" made in informal rule making proceedings. Senate Hearings (1941) p. 444. Accordingly, except in formal rule making governed by sections 7 and 8, an agency is free to formulate rules upon the basis of materials in its files and the knowledge and experience of the agency, in addition to the materials adduced in public rule making proceedings.

Section 4 (b) provides that upon the completion of public rule making proceedings "after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose". The required statement will be important in that the courts and the public may be expected to use such statements in the interpretation of the agency's rules. The statement is to be "concise" and "general". Except as required by statutes providing for "formal" rule making procedure, findings of fact and conclusions of law are not necessary. Nor is there required an elaborate analysis of the rules or of the considerations upon which the rules were issued. Rather, the statement is intended to advise the public of the general basis and purpose of the rules.

Formal rule making. Section 4 (b) provides that "Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection." Thus, where a rule is required by some other statute to be issued on the basis of a record after opportunity for an agency hearing, the public rule making proceedings must consist of hearing and decision in accordance with sections 7 and 8. The provisions of section 5 are in no way applicable to rule making. It should be noted that sections 7 and 8 did not become effective until December 11, 1946, and, pursuant to section 12, do not apply to any public rule making proceedings initiated prior to that date.

Statutes rarely require hearings prior to the issuance of rules of general applicability. Such requirements, where they exist, appear in radically different contexts. The Federal Food, Drug and Cosmetic Act (21 U.S.C. 301) is almost unique in that it specifically provides that agency action issuing, amending or repealing specified classes of substantive rules may be taken only after notice and hearing, and that "The Administrator shall base his order only on substantial evidence of record at the hearing and shall set forth as part of the order detailed findings of fact on which the order is based." Upon review in a circuit court of appeals, a transcript of the record is filed, and "the findings of the Administrator as to the facts, if supported by substantial evidence, shall be conclusive" (21 U.S.C. 371). It is clear that such rules are "required by statute to be made on the record after opportunity for an agency hearing". Accordingly, the rule making hearings required by the Federal Food, Drug and Cosmetic Act, initiated on and after December 11, 1946, must be conducted in accordance with sections 7 and 8 of the Administrative Procedure Act.

Statutes authorizing agencies to prescribe future rates (i.e., rules of either general or particular applicability) for public utilities and common carriers typically require that such rates be established only after an opportunity for a hearing before the agency. Such statutes rarely specify in terms that the agency action must be taken on the basis of the "record" developed in the hearing. However, where rates or prices are established by an agency after a hearing required by statute, the agencies themselves and the courts have long assumed that the agency's action must be based upon the evidence adduced at the hearing. Sometimes the requirement of decision on the record is readily inferred from other statutory provisions defining judicial review. For example, rate orders issued by the Federal Power Commission pursuant to the Natural Gas Act (15 U.S.C. 717) may be made only after hearing; upon review in a circuit court of appeals or the Court of Appeals for the District of Columbia, the Commission certifies and files with the court "a transcript of the record upon which the order complained of was entered", and the Commission's findings of fact "if supported by substantial evidence, shall be conclusive". It seems clear that these provisions of the Natural Gas Act must be construed as requiring the Commission to determine rates "on the record after opportunity for an agency hearing". See H.R. Rep. p. 51, fn. 9 (Sen. Doc. p. 285). The same conclusion would be reached with respect to the determination of minimum wages under the Fair Labor Standards Act (29 U.S.C. 201), which contains substantially the same provisions for hearing and judicial review.

The Interstate Commerce Commission and the Secretary of Agriculture may, after hearing, prescribe rates for carriers and stockyard agencies, respectively. Both types of rate orders are reviewable under the Urgent Deficiencies Act of 1913 (28 U.S.C. 47). Nothing in the Interstate Commerce Act, the Packers and Stockyards Act, or the Urgent Deficiencies Act requires in terms that such rate orders be "made on the record", or provides for the filing of a transcript of the administrative record with the reviewing court, or defines the scope of judicial review. However, both of these agencies and the courts have long assumed that such rate orders must be based upon the record made in the hearing; furthermore, it has long been the practice under the Urgent Deficiencies Act to review such orders on the basis of the administrative record which is submitted to the reviewing court. *United States* v. *Abilene & Southern Ry. Co.*, 265 U.S. 274 (1924); *Mississippi Valley Barge Line Co.* v. *United States*, 292 U.S. 282 (1934); *Acker* v. *United States*, 298 U.S. 426 (1936). It appears, therefore, that rules (as defined in section 2(c)) which are issued after a hearing required by statute, and which are reviewable under the Urgent Deficiencies Act on the basis of the evidence adduced at the agency hearing, must be regarded as "required by statute to be made on the record after opportunity for an agency hearing".

With respect to the types of rule making discussed above, the statutes not only specifically require the agencies to hold hearings but also, specifically, or by clear implication, or by established administrative and judicial construction, require such rules to be formulated upon the basis of the evidentiary record made in the hearing. In these situations, the public rule making procedures required by section 4(b) will consist of a hearing conducted in accordance with sections 7 and 8.

There are other statutes which require agencies to hold hearings before issuing rules, but contain no language from which the further requirement of decision "on the record" can be inferred, nor any provision for judicial review on the record (as does the Natural Gas Act, *supra*). For example, the Federal Seed Act (7 U.S.C. 1561) simply provides that "prior to the promulgation of any rule or regulation under this chapter, due notice shall be given by publication in the Federal Register of intention to promulgate and the time and place of a public hearing to be held with reference thereto, and no rule or regulation may be promulgated until after such hearing". See also the so-called Dangerous Cargoes Act (46 U.S.C. 170(9)) and the Tanker Act (46 U.S.C. 391a(3)) discussed in Senate Hearings (1941) p. 589. In this type of statute, there is no requirement, express or implied, that rules be formulated "on the record".

There is persuasive legislative history to the effect that the Congress did not intend sections 7 and 8 to apply to rule making where the substantive statute merely required a hearing. In 1941, a subcommittee of the Senate Committee on the Judiciary held hearings on S. 674 (77th Cong., 1st sess.) and other administrative procedure bills. Section 209(d) of S. 674 provided with respect to rule making that "where legislation specifically requires the holding of hearings prior to the making of rules, formal rule-making hearings shall be held". Mr. Ashley Sellers, testifying on behalf of the Department of Agriculture, called the subcommittee's attention to the fact that in various statutes, such as the Federal Seed Act, in which the Congress had required hearings to be held prior to the issuance of rules, the obvious purpose "was simply to require that the persons interested in the proposed rule should be permitted to express their views". Mr. Sellers drew a sharp distinction between such hearing requirements and the formal rule making requirements of the Federal Food, Drug and Cosmetic Act. Senate Hearings (1941) pp. 78-81, 1515, 1520.[4] Since this situation was thus specifically called to the subcommittee's attention, it is a legitimate inference that with respect to rule making the present dual requirement, i.e., "after opportunity for an agency hearing" *and* "on the record", was intended to avoid the application of formal procedural requirements in cases where the Congress intended only to provide an opportunity for the expression of views. See Mr. Carl McFarland's statement in Senate Hearings (1941) pp. 1343, 1386. See also *Pacific States Box & Basket Co.* v. *White,* 296 U.S. 176, 186 (1935).

Publication of procedures. Each agency which will be affected by section 4 should publish under section 3(a) (2) the procedures, formal and informal, pursuant to which the public may participate in the formulation of its rules. The statement of informal rule making procedures may be couched in either specific or general terms, depending on whether the agency has adopted a fixed procedure for all its rule making or varies it according to the type of rule to be promulgated. In the latter instance, it would be sufficient to state that proposed substantive rules will be adopted after allowing the public to participate in the rule making process either through submission of written data, oral testimony, etc., the method of participation in each case to be specified in the published notice in the Federal Register. H.R. Rep. p. 25 (Sen. Doc. p. 259).

SECTION 4(C)—EFFECTIVE DATES

Section 4(c) provides that "The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule." This requirement applies regardless of whether the rules are issued after formal or informal procedure.

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[4] See, also, the statement of Acting Attorney General Biddle citing examples of "statutes which require hearings as a part of the rule making procedure without imposing a requirement of formal adversary judicial methods". Senate Hearings (1941) p. 1468.

The discussion on section 4(c) in the reports of both the Senate and House Committees on the Judiciary makes clear that the phrase "The required publication or service of any substantive rule" does not relate back or refer to the publication of "general notice of proposed rule making" required by section 4(a); rather it is a requirement that substantive rules which must be published in the Federal Register (see section 3(a) (3)) shall be so published at least thirty days prior to their effective date. Similarly, "rules addressed to and served upon named persons", when they are substantive in nature, are subject to section 4(c). The purpose of the time lag required by section 4(c) is to "afford persons affected a reasonable time to prepare for the effective date of a rule or rules or to take any other action which the issuance of rules may prompt". Sen. Rep. p. 15; H.R. Rep. p. 25 (Sen. Doc. pp. 201, 259).

It is possible that section 4(c) will be interpreted as amending the Federal Register Act so as to require, with respect to rules subject to section 4(c), actual publication in the Federal Register (or service) at least thirty days prior to their effective date, rather than the mere filing of such rules with the Division of the Federal Register as heretofore. In any event, section 4(c) applies only to such *substantive rules* as are not excepted from all the provisions of section 4 by its introductory clause or by section 2(a) of the Act. It is clear, for example, that the effective date of rules issued within the scope of the functions exempted from all of the requirements of section 4 by the introductory clause of that section, will continue to be governed by section 7 of the Federal Register Act (44 U.S.C. 307), rather than by section 4(c) of the Administrative Procedure Act. Thus, where an agency issues rules relating to public property, such rules may be made effective upon filing with the Division of the Federal Register.

Also, section 7 of the Federal Register Act is not superseded in so far as there are involved rules granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy. Thus, there still may be made effective upon filing with the Division of the Federal Register statements of policy and interpretative rules. Likewise excepted from the thirty-day requirement of section 4 (c) are rules "granting or recognizing exemption or relieving restriction". For example, if a statute prohibits the doing of an act without prior agency approval and such approval falls within the definition of "rule" in section 2(c), the action of the agency in approving such act, i.e., removing the restriction or providing an exemption, may be made effective without regard to the thirty-day requirement. Senate Hearings (1941) p. 1296. Also, the relaxation of a restrictive rule by an amendment, or the repeal of such a rule, would seem to be within the scope of the exception. The reason for this exception would appear to be that the persons affected by such rules are benefited by them and therefore need no time to conform their conduct so as to avoid the legal conseqences of violation. The fact that an interested person may object to such issuance, amendment, or repeal of a rule does not change the character of the rule as being one "granting or recognizing exemption or relieving restriction", thereby exempting it from the thirty-day requirement.

The requirement of publication not less than thirty days prior to the effective date may be shortened by an agency "upon good cause found and published with the rule". This discretionary exception was provided primarily to take care of the cases in which the public interest requires the agency to act immediately or within a period less than thirty days. Senate Hearings (1941) pp. 70, 441, 588, 650, 812, 1506. Where the persons concerned request that a rule be made effective within a shorter period, this circumstance would ordinarily constitute good cause. Also, it is clear from the legislative history that for good cause an agency may put a substantive rule into effect immediately; in such event, the requirement of prior publication is altogether absent, and the rule will become effective upon issuance as to persons with actual notice, and as to others upon filing with the Division of the Federal Register in accordance with section 7 of the Federal Register Act. Senate Hearings (1941) pp. 594, 599, 1340, 1455. Nothing in the Act precludes the issuance of retroactive rules when otherwise legal and accompanied by the finding required by section 4 (c). H.R. Rep. p. 49, fn. 1 (Sen. Doc. p. 283).

Where an agency, pursuant to the last clause of section 4(a), omits the procedures of section 4 (a) and (b) because "notice and public procedure thereon are impracticable, unnecessary or contrary to the public interest", subsection (c) does not thereby become automatically inoperative. If the situation is such as to compel the agency, in addition, to dispense with the thirty-day provision, the rule should also contain the finding required by the last clause of section 4 (c).

Section 4 (c) is not intended to repeal provisions of other statutes which require a period of longer than thirty days between the issuance and effective date of certain rules. For example, the Cotton Standards Act authorizes the Secretary of Agriculture to set cotton classification standards which may not become effective in less than one year (7 U. S. C. 56). The thirty-day period prescribed by section 4(c) of the Administrative Procedure Act does not supersede the one-year period thus required by the Cotton Standards Act.

SECTION 4(d)—PETITIONS

Section 4(d) provides that "Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule." Section 4(d) applies not only to substantive rules but also to interpretations and statements of general policy, and to organizational and procedural rules. It is applicable both to existing rules and to proposed or tentative rules.

The right to petition under section 4(d) must be accorded to any "interested person". It will be proper for an agency to limit this right to persons whose interests are or will be affected by the issuance, amendment or repeal of a rule.

Every agency with rule making powers subject to section 4 should establish, and publish under section 3(a)(2), procedural rules governing the receipt, consideration and disposition of petitions filed pursuant to section 4(d). These procedural rules may call, for example, for a statement of the rule making action which the petitioner seeks, together with any data available in support of his petition, a declaration of the petitioner's interest in the proposed action, and compliance with reasonable formal requirements.

If the agency is inclined to grant the petition, the nature of the proposed rule would determine whether public rule making proceedings under section 4(a) and (b) are required. However, the mere filing of a petition does not require the agency to grant it or to hold a hearing or to engage in any other public rule making proceedings. For example, under section 701(e) of the

Federal Food, Drug and Cosmetic Act (21 U.S.C. 371(e)), the Federal Security Administrator must provide a hearing on a proposed rule only where an application, stating reasonable grounds, is made by an interested industry or a substantial portion of the industry. Section 4(d) was not intended to modify that statute so as to require the Federal Security Administrator to hold a hearing on the petition of a single individual.

The agency need act on the petition only in accordance with its procedures as published in compliance with section 3(a)(2). The denial of a petition is governed by section 6(d). Sen. Rep. p. 15; H.R. Rep. p. 26 (Sen. Doc. pp. 201, 260). Accordingly, prompt notice of such denial should be given to the petitioner, together with a simple statement of the procedural or other grounds therefor.

Neither the denial of a petition under section 4(d), nor an agency's refusal to hold public rule making proceedings thereon, is subject to judicial review. Sen. Rep. p. 44 (Sen. Doc. p. 230).

This subsection (as in the case of the preceding portions of section 4) does not apply to rules relating to the functions and matters enumerated in the first sentence of section 4. The reports of the Senate and House Committees on the Judiciary state that "The introductory clause exempts from *all of the requirements* of section 4 any rule making so far as there are involved (1) military, naval, or foreign affairs functions or (2) matters relating to agency management or personnel or to public property, loans, grants, benefits, or contracts." (Underscoring supplied). Sen. Rep. p. 13; H.R. Rep. p. 23 (Sen. Doc. pp. 199, 257). The petition procedure of section 4(d) is not applicable, for example, to the rules which an agency has issued or is empowered to issue with respect to loans or pensions.

IV

SECTION 5—ADJUDICATIONS

Section 5, together with sections 7 and 8, governs the procedure in formal administrative adjudication. In addition, section 5 lists the types of adjudication which are exempted from the detailed procedural requirements of sections 5, 7 and 8. It is to be noted that the excepted types of adjudication are exempt from *all* of the provisions of section 5, as well as of sections 7 and 8. Thus, if a particular matter is "subject to a subsequent trial of the law and the facts de novo in any court", subsection (d), authorizing agencies to issue declaratory judgments, is not applicable.

GENERAL SCOPE OF FORMAL PROCEDURAL REQUIREMENTS

"Adjudication" is defined as "agency process for the formulation of an order"; "order" is in turn defined as "the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing" (section 2 (d)). Thus, investigatory proceedings, no matter how formal, which do not lead to the issuance of an order containing the element of final disposition as required by the definition, do not constitute adjudication. For example, accident investigations conducted by the Civil Aeronautics Authority pursuant to Title VII of the Civil Aeronautics Act do not result in orders, and therefore do not involve adjudication within the meaning of section 5.[1]

After examining the definition of "rule making" in section 2(c), it is apparent that the residual definition of "adjudication" in section 2 (d) might include many governmental functions, such as the administration of loan programs, which traditionally have never been regarded as adjudicative in nature and as a rule have never been exercised through other than business procedures. The exclusion of such functions from the formal procedural requirements of sections 5, 7 and 8 is accomplished by the introductory phrase of section 5 which limits its application (and, therefore, the application of sections 7 and 8) to cases of "adjudication required by statute to be determined on the record after opportunity for an agency hearing". It has been pointed out that "Limiting application of the sections to those cases in which statutes require a hearing is particularly significant, because thereby are excluded the great mass of administrative routine as well as pensions, claims, and a variety of similar matters in which Congress has usually intentionally or traditionally refrained from requiring an administrative hearing." Senate Comparative Print of June 1945, p. 7 (Sen. Doc. p. 22).

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[1] In the Senate Comparative Print of June 1945, p. 2 (Sen. Doc. p. 13), it is stated: "It should be noted that the definition of agencies does not mean that all acts of such agencies are subject to the procedural requirements. * * * If an agency is subject to the proposal under this section, nevertheless it is subject thereto only to the extent that acts, rules, or orders are defined and not further excluded in the following sections and subsections."

It will be noted that the formal procedural requirements of the Act are invoked only where agency action "on the record after opportunity for an agency hearing" is required by some other *statute.* The legislative history makes clear that the word "statute" was used deliberately so as to make sections 5, 7 and 8 applicable only where the Congress has otherwise *specifically* required a hearing to be held. Senate Hearings (1941) pp. 453, 577; Senate Comparative Print of June 1945, p. 7 (Sen. Doc. p. 22); House Hearings (1945) p. 33 (Sen. Doc. p. 79); Sen. Rep. p. 40 (Sen. Doc. p. 226); 92 Cong. Rec. 5651 (Sen. Doc. p. 359). Mere statutory authorization to hold hearings (e.g., "such hearings as may be deemed necessary") does not constitute such a requirement. In cases where a hearing is held, although not required by statute, but as a matter of due process or agency policy or practice, sections 5, 7 and 8 do not apply. Senate Hearings (1941) p. 1456.

Under section 5 of the Federal Trade Commission Act, for example, it is clear that orders to cease and desist from unfair methods of competition must be issued on the basis of the record made in the hearing which is required by that Act (15 U. S. C. 45). See also section 10 of the National Labor Relations Act (29 U. S. C. 160). Licensing proceedings constitute adjudication by definition and where they are required by statute to be "determined on the record after opportunity for an agency hearing", sections 5, 7 and 8 are applicable. Thus, under section 15 of the Securities Exchange Act (15 U. S. C. 78o), the Securities and Exchange Commission may deny an application for broker-dealer registration or revoke such registration after notice and opportunity for hearing; while the Securities Exchange Act does not expressly require orders of denial or revocation of registration to be made "on the record", such a requirement is clearly implied in the provision for judicial review of these orders in the circuit courts of appeal. Upon such review, the Commission files "a transcript of the record upon which the order complained of was entered", and "The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." (15 U. S. C. 78y).

Other statutes authorizing agency action which is clearly adjudicatory in nature, such as the revocation of licenses, specifically require the agency to hold a hearing but contain no provision expressly requiring decision "on the record". For example, the Secretary of Agriculture may issue cease and desist orders under section 312 of the Packers and Stockyards Act, 1921 (7 U. S. C. 213), only after "notice and full hearing", and these orders are made reviewable under the Urgent Deficiencies Act. The Department of Agriculture has always assumed that these orders must be based upon the evidentiary record made in the hearing, and the courts have held that upon review the validity of an order issued under the Packers and Stockyards Act must be determined upon the administrative record. *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420 (1930). It seems clear that administrative adjudication exercised in this context is subject to sections 5, 7 and 8.

A further group of statutes merely authorizes adjudicatory action after hearing, and contains no reference to decision "on the record" nor any specific provision for judicial review. Thus, under the United States Warehouse Act, the Secretary of Agriculture may suspend or revoke warehousemen's licenses "after opportunity for hearing" (7 U.S.C. 246). It is believed that with respect to adjudication the specific statutory requirement of a hearing, without anything more, carries with it the further requirement of decision on the basis of the evidence adduced at the hearing.[2] With respect to rule making, it was concluded, *supra*, that a statutory provision that rules be issued after a hearing, without more, should not be construed as requiring agency action "on the record", but rather as merely requiring an opportunity for the expression of views. That conclusion was based on the legislative nature of rule making, from which it was inferred, unless a statute requires otherwise, that an agency hearing on proposed rules would be similar to a hearing before a legislative committee, with neither the legislature nor the agency being limited to the material adduced at the hearing. No such rationale applies to administrative adjudication. In fact, it is assumed that where a statute specifically provides for administrative adjudication (such as the suspension or revocation of a license) after opportunity for an agency hearing, such specific requirement for a hearing ordinarily implies the further requirement of decision in accordance with evidence adduced at the hearing. H.R. Rep. p. 51, fn. 9 (Sen. Doc. p. 285). Of course, the foregoing discussion is inapplicable to any situation in which the legislative history or the context of the pertinent statute indicates a contrary congressional intent.

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[2] It is clear that nothing in the Administrative Procedure Act precludes private parties from waiving their right to a hearing. Similarily, an agency is not prevented from requiring parties to indicate within a reasonable time their desire for a hearing.

Certain licensing statutes provide that an application for a license may be granted or become effective upon lapse of time without a hearing, but that there must be an opportunity for hearing prior to the denial of the application. See Securities Exchange Act of 1934, section 15(b), (15 U. S. C. 78o(b)) and Communications Act of 1934, section 309 (47 U. S. C. 309). Nothing in section 5 of the Administrative Procedure Act is intended to require hearings where such statutes now permit the granting of licenses without a hearing.

Exempted adjudications. Section 5 specifically exempts from its provisions (and, accordingly, from the provisions of sections 7 and 8) six types of adjudicatory functions or proceedings which are discussed hereafter. It is important to note that these exemptions extend to *all* of the provisions of section 5. Furthermore, the exemption is applicable even where the exempted function is required by statute to be exercised "on the record after opportunity for an agency hearing". Sen. Rep. p. 16; H.R. Rep. p. 26 (Sen. Doc. pp. 202, 260).

1. "Any matter subject to a subsequent trial of the law and the facts de novo in any court". This exemption was explained in the reports of the Senate and House Committees on the Judiciary, as follows: "Where the adjudication is subject to a judicial trial de novo [it] is included because whatever judgment the agency makes is effective only in a prima facie sense at most and the party aggrieved is entitled to complete judicial retrial and decision." Sen. Rep. p. 16; H.R. Rep. p. 26 (Sen. Doc. pp. 202, 260). Exempt under this heading are certain proceedings which lead to reparation orders awarding damages, such as are issued by the Interstate Commerce Commission (49 U. S. C. 16) and the Secretary of Agriculture (7 U. S. C. 210). Senate Hearings (1941) pp. 75, 1389, 1508. In the Senate Comparative Print of June 1945

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(p. 8) (Sen. Doc. p. 22) the scope of the exemption was described as follows:

> This exception also exempts administrative reparation orders assessing damages, such as are issued by the Interstate Commerce Commission and the Secretary of Agriculture, since such orders are subject to trial *de novo* in court upon attempted enforcement.

2. "The selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11". This exemption of adjudications involving the selection and tenure of officers other than examiners was made "because the selection and control of public personnel has been traditionally regarded as a largely discretionary function". Sen. Rep. p. 16; H.R. Rep. p. 26 (Sen. Doc. pp. 202, 260). There is excluded from this exemption the selection or tenure of "examiners appointed pursuant to section 11"; this refers to the provision of section 11 that "Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission * * * after opportunity for hearing and upon the record thereof." Proceedings for the removal of such examiners must be conducted in accordance with sections 5, 7 and 8.

3. "Proceedings in which decisions rest solely on inspections, tests, or elections". The reason for the exemption is that "those methods of determination do not lend themselves to the hearing process". Sen. Rep. p. 16; H.R. Rep. p. 27 (Sen. Doc. pp. 202, 261). This exemption is applicable even though a statute requires an opportunity for an agency hearing; thus the words "rest solely" do not mean that the exemption is available only where decisions are based solely upon inspections, tests, or elections, without opportunity for hearing or other proceedings. Rather, "rest solely" appears to mean that the exemption shall apply where all the issues involved in the decision are determined mainly on the basis of an inspection, test, or election. The legislative history of the Act, commencing with the Final Report of the Attorney General's Committee on Administrative Procedure, pp. 36-38, suggests the following as examples of "proceedings in which decisions rest solely on inspections, tests, or elections":

(a) the denial of airman certificates under section 602 of the Civil Aeronautics Act (49 U. S. C. 552) (statute provides for a hearing); Senate Hearings (1941) pp. 602-3;

(b) the denial or revocation of certificates of seaworthiness by local inspectors of the Coast Guard (46 U. S. C. 391); Senate

Hearings (1941) pp. 833-4;

(c) locomotive inspections by the Interstate Commerce Commission (45 U. S. C. 29) (statute provides for a hearing); Senate Hearings (1941) pp. 833-4;

(d) the grading of grain under the United States Grain Standards Act (7 U. S. C. 71 et seq.); Senate Hearings (1941) pp. 833-4.

The rationale for exempting such adjudications from formal procedural requirements was well stated by the Attorney General's Committee on Administrative Procedure in the following passage:

> In all these cases, as well as in others not here described, the most important element in the decision is the judgment of the man who saw and tested the ship or grain or fruit or locomotive, or who examined the prospective airplane pilot, or seaman, or proposed periodical. Formal proceedings are not, of course, impossible. A trial examiner could be designated; the inspector could be summoned to testify, under oath, concerning his observations just as a traffic officer who gives a driving test to an applicant for a motor operator's permit could be required to describe the applicant's performance to a second officer who could, in turn, decide whether the permit should be issued. But resort to formal procedure in this type of administrative matter, although sometimes provided for as in certain of the instances noted above, is not desired or utilized by the person whose rights or privileges are being adjudicated, because it gives no added protection. The judgment of the inspector who examined the applicant or tested the article would necessarily remain the determining element in the decision, and, in any event, some immediate decision concerning the fitness of an applicant, or of an airplane, or a locomotive, or a ship, is necessary to protect the public interest. That cannot await a formal hearing. Nor would formal procedure give greater assurance of a correct decision. The surest way to ascertain what is the grade of grain is for a skilled inspector to test it; the best way to discover whether the radio equipment of a ship is in proper working order is for a radio mechanic to examine it and test it. (Final Report, p. 37)

For further legislative history relating to this exemption, see Senate Hearings (1941) pp. 590, 602, 833.

4. "The conduct of military, naval, or foreign affairs functions". Both Committee reports state that the section "exempts military, naval, and foreign affairs functions for the same reasons that they are exempted from section 4; and, in any event, rarely if ever do statutes require such functions to be exercised upon hearing." Sen. Rep. p. 16; H.R. Rep. p. 27 (Sen. Doc. pp. 202, 261). Thus, the exercise of adjudicatory functions by the War and Navy Departments or by any other agency is exempt to the extent that the conduct of military or naval affairs is involved. Senate Hearings (1941) pp. 502-3. The term "foreign affairs functions" appears to be used in the same sense as in section 4. H.R. Rep. p. 27 (Sen. Doc. p. 261).

5. "Cases in which an agency is acting as an agent for a

court". This is self-explanatory. Senate Hearings (1941) pp. 422, 474, 1457.

6. "The certification of employee representatives". This exemption for "the certification of employee representatives such as the Labor Board operations under section 9(c) of the National Labor Relations Act, is included because those determinations rest so largely upon an election or the availability of an election". Sen. Rep. p. 16; H.R. Rep. p. 27 (Sen. Doc. pp. 202, 261). And see Senate Hearings (1941) pp. 260, 271. It also exempts the certification of employee representatives by the National Mediation Board pursuant to section 2(9) of the Railway Labor Act (45 U. S. C. 152).

SECTION 5(a)—NOTICE

The first sentence of section 5(a) provides that "Persons entitled to notice of an agency hearing shall be timely informed of—

(1) "the time, place, and nature thereof". The subsection does not specify the period of notice of hearing to be given by an agency, other than to require "timely" notice. Whether a given period of time constitutes timely notice will depend upon the circumstances, including the urgency of the situation and the complexity of the issues involved in the proceeding. It is clear that nothing in the subsection revokes the specific provisions of other statutes as to the amount of notice which must be given in various proceedings. See generally section 8 of the Federal Register Act (44 U.S.C. 308) and specific statutory provisions such as section 5 of the Federal Trade Commission Act, requiring 30 days' notice of hearing (15 U. S. C. 45). In addition to specifying the time and place of hearing, the notice should specify the nature of the hearing, e.g., whether a cease and desist order should issue.

The last sentence of section 5(a) provides that "In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives." This simply means that consistent with the public interest and the due execution of the agency's functions, each agency shall attempt to schedule hearings at times and places which will be convenient for the parties and their representatives. Sen. Rep. p. 17 (Sen. Doc. p. 203).

(2) "the legal authority and jurisdiction under which the hearing is to be held". The notice should contain reference to the

agency's authority sufficient to inform the parties of the legal powers and jurisdiction which the agency is invoking in the particular case, and thus enable the parties to raise any legal issues they consider relevant.

(3) "The matters of fact and law asserted". It is not required to set forth evidentiary facts or legal argument. All that is necessary is to advise the parties of the legal and factual issues involved.

Responsive pleading. The second sentence of section 5(a) provides that "In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading." In the Committee reports, it is stated that "The second sentence of the subsection applies in those cases where the agency does not control the matter of notice because private persons are the moving parties; and in such cases the respondent parties must give notice of the issues of law and fact which they controvert so that the moving party will be apprised of the issues he must sustain." Sen. Rep. p. 17; H.R. Rep. p. 27 (Sen. Doc. pp. 203, 261). The first clause of this sentence is mandatory. This provision for responsive pleading appears to be applicable, for example, where the moving party is applying for a license and the agency admits as parties or intervenors competitors of the applicant who are opposing the application. Under section 5(a), the agency should require such additional parties to disclose their position promptly. While the subsection does not specify the consequences to be attached to a party's failure so to plead, it would clearly support an agency rule requiring a party to answer specifically the allegations of the moving party, or be deemed to have admitted such allegations.

The second sentence of section 5(a) also provides that "in other instances agencies may by rule require responsive pleading". "In other instances" apparently refers to cases in which the agency, rather than a private party, is the moving party. Thus, the quoted clause authorizes an agency, in adjudicatory proceedings which it has initiated, such as for the suspension or revocation of licenses, to require the respondent to plead responsively, i.e., to "give prompt notice of issues controverted in fact or law".

SECTION 5(b)—PROCEDURE

Section 5(b) provides that "The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing,[3] and decision upon notice and in conformity with section 7 and 8." The settlement of cases and issues by informal methods is nothing new in Federal administrative procedure. In its Final Report, the Attorney General's Committee on Administrative Procedure pointed out (p. 35) that "even where formal proceedings are fully available, informal procedures constitute the vast bulk of administrative adjudication and are truly the lifeblood of the administrative process".

Like section 5 generally, subsection 5(b) applies only to cases "of adjudication required by statute to be determined on the record after opportunity for an agency hearing". The purpose of this subsection is to provide, so far as practicable, for the informal settlement or adjustment of controversies in lieu of formal adjudicatory proceedings. Section 5(b), however, does not require agencies to settle informally all cases which the parties desire to settle. Rather it requires the agencies to make available opportunities for such settlements, "where time, the nature of the proceeding, and the public interest permit".

Agencies must in some way provide opportunities for informal disposition of controversies. However, the precise manner in which such opportunities are to be afforded has been deliberately left by Congress to development by the agencies themselves. See Senate Comparative Print of June 1945, p. 9 (Sen. Doc. p. 24). The subsection apparently leaves the agencies free to provide such opportunity either before or after the initiation of a formal proceeding (e.g., the issuance of a complaint). If the opportunity is to be made available prior to the issuance of a complaint or notice, the agency must in some way advise the parties that formal proceedings are contemplated. In such a situation, the agency should advise the party at some preliminary stage (investigatory or otherwise) that it is contemplating the initiation of a formal proceeding and that it is giving him an opportunity to settle or adjust the matter. Where the opportunity is made available after the issuance of a notice or complaint, it is sufficient if the agency's published procedures advise parties as to how an informal settlement or adjustment may be sought.

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[3] The comma after "hearing" in section 5(b) is a printer's error.

Whether such opportunity is provided before or after the initiation of the formal proceeding, it should enable parties to present their proposals for settlement to responsible officers or employees of the agency. Since section 5(b) does not prescribe adjustment procedures, they may consist entirely of oral conferences or agencies may require proposals for adjustment or settlement to be submitted in writing. If proposals are submitted and they are unsatisfactory, the agency should consider the advisability of informing the parties involved of the conditions, if any, on which the agency is willing to settle the controversy or accept compliance without formal proceedings. It is clear that section 5(b) does not require an agency to defer formal proceedings indefinitely while parties submit a series of proposals for the purpose of delay.

In the settlement of cases pursuant to section 5(b), agencies may, as heretofore, require parties to enter into consent decrees or orders or stipulations to cease and desist as a part of the settlement. As Representative Walter stated: "The settlement by consent provision is extremely important because agencies ought not to engage in formal proceedings where the parties are perfectly willing to *consent to judgments* or adjust situations informally." [Italics supplied] 92 Cong. Rec. 5651 (Sen. Doc. p. 361). Final Report, pp. 41-42.

The requirement of section 5(b) that agencies provide opportunity for informal settlement is limited to cases "where time, the nature of the proceeding, and the public interest permit". The quoted language is to be treated in the alternative. Where an agency is confronted with the necessity for emergency action or where a statutue requires that a hearing be held within a limited period of time, the agency may be obliged to limit or refuse opportunity for informal settlement. The "nature of the proceeding" may be said to preclude negotiation in situations where the party has declared that he does not intend to comply with a known requirement of the agency or where statutes require that hearings be held in any event.[4] Senate Hearings (1941) p. 1474. Where an agency believes that the informal settlement of an alleged violation or certain classes of violations will not insure future compliance with law, it would be justified in concluding that such settlement by consent would not be in the public interest.

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[4] For example, the Civil Aeronautics Board is required to hold hearings before granting a certificate of public convenience and necessity for a new route (49 U. S. C. 481).

Each agency should make public, pursuant to section 3(a), the manner in which it will provide interested parties an opportunity for the informal settlement or adjustment of the matters in issue. H.R. Rep. p. 27 (Sen. Doc. p. 261).

SECTION 5(c)—SEPARATION OF FUNCTIONS

Section 5(c) generally requires each agency, in the adjudication of cases subject to section 5, to establish an internal separation of functions between the officials who hear and decide and those who investigate or prosecute. The discussion will be simplified if the exceptions from the requirements of section 5(c) are considered first.

Exceptions. Section 5(c), like the rest of section 5, applies only to cases of adjudication "required by statute to be determined on the record after opportunity for an agency hearing", and if the subject matter of the proceeding is not exempted by the first paragraph of section 5. Rule making, of course, is not subject to section 5(c). Section 5(c), in addition, provides that the provisions of that subsection "shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers".

Section 5(c) does not apply to agency proceedings to determine applications for initial licenses—regardless of whether the agency grants or denies the license. "License" is defined in section 2(d). The phrase "initial license" must be interpreted from the context and legislative history.

The Administrative Procedure Act is based upon a broad and logical dichotomy between rule making and adjudication, i.e., between the legislative and judicial functions. See Chapter I. The legislative history of section 5(c) reveals that "determining applications for initial licenses" was exempted from the requirements of the subsection on the ground that such proceedings are similar to rule making. In the Committee reports, it is explained that "The exemption of applications for initial licenses frees from the requirements of the section such matters as the granting of certificates of convenience and necessity, upon the theory that in most licensing cases the original application may be much like rule making. The latter, of course, is not subject to any provision of section 5." Sen. Rep. p. 17; H.R. Rep. p.

30 (Sen. Doc. pp. 203, 262). The rationale for the exemption was further developed by Representative Walter on the floor of the House, as follows: "However, the subsection does not apply in determining applications for initial licenses, because it is felt that the determination of such matters is much like rule making and hence the parties will be better served if the proposed decision—later required by section 8—reflects the views of the responsible officers in the agencies whether or not they have actually taken the evidence." 92 Cong. Rec. 5651 (Sen. Doc. p. 361).

In view of the function of the exemption, the phrase "application for initial licenses" must be construed to include applications by the licensee for modifications of his original license. In effect, this gives full meaning to the broad definition of "license" in section 2(e), i.e., "the whole or part of any agency *permit*, certificate, *approval*, registration, charter, membership, statutory exemption *or other form of permission*". [Italics supplied] In other words, the definition clearly suggests that any agency "approval" or "permission" is a license, regardless of whether it is in addition to or related to an earlier license.[5] Only by such a construction can the appropriate procedures be made applicable to those aspects of licensing which are dominated by policy making considerations and in which accusatory and disciplinary factors are absent. Senate Hearings (1941) p. 1451. In this way, the basic dichotomy of the Act between rule making and adjudication is preserved, because section 5(c) will remain applicable to licensing proceedings involving the renewal, revocation, suspension, annulment, withdrawal or the *agency-initiated* modification or amendment of licenses—i.e., all those phases of licensing in which the accusatory or disciplinary factors are, or are likely to be, present.

This interpretation of the scope of the exemption is consistent with the remainder of its legislative history. When the ad-

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[5] Any other interpretation of the exemption will largely destroy it and will result in an erratic application of section 5(c). For example, the function of the Civil Aeronautics Board with respect to certificates of public convenience and necessity increasingly relates to applications for modifications or extensions of existing routes rather than to original applications for entirely new routes. Thus, A, with a certificate for a route from New York to Chicago with a stop at Cleveland, may apply for a modification of the certificate to permit an additional stop at Pittsburgh. The considerations involved in determining such an application for modification of A's certificate are the same as those involved in his original application—traffic flow, availability of facilities, effect on competing carriers, etc. The accusatory and disciplinary elements are entirely lacking. Another example clearly illustrates the inconsistent results of such a narrow construction of the exemption for initial licensing: A has a certificate for a route from New York to St. Louis, and he applies for a modification which will authorize extension of the route to Omaha; B applies for a new certificate authorizing him to operate a route between St. Louis and Omaha. Under the narrow construction of the exemption, section 5(c) would apply to the Board's determination of A's application, but would not be applicable with respect to B's application. Similar anomalies would exist under the Federal Power Act, the Communications Act and the Natural Gas Act, particularly the latter.

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ministrative procedure bill (S. 7) was introduced by Senator McCarran in January 1945, the provision that was then section 5(b) contained an exemption for "determining applications for licenses". When S. 7 was reported by the Senate Committee on the Judiciary in November 1945, section 5(c) contained the present language exempting "determining applications for initial licenses". In the discussion of the definitions of "adjudication" and "licensing" in the Committee reports, it is stated that "Licensing is specifically included [in adjudication] to remove any question, since licenses involve a pronouncement of present rights of named parties although they may also prescribe terms and conditions for future observance. Licensing as such is later exempted from some of the provisions of sections 5, 7 and 8 relating to hearings and decisions. * * * *Later provisions of the bill distinguish between initial licensing and renewals or other licensing proceedings.*" [Italics supplied] Sen. Rep. p. 11; H.R. Rep. p. 20 (Sen. Doc. pp. 197, 254). It is apparent from the legislative history that the word "initial" was inserted in the exception to distinguish original applications for licenses, i.e., any agency "approval" or "permission", from applications for renewals of licenses. This is entirely consistent with the underlying analogy of initial licensing to rule making, because renewal proceedings frequently involve a review of the licensee's past conduct and thus resemble adjudication rather than rule making.

The insertion of "initial" similarly distinguishes applications for licenses from modifications or limitations imposed by an agency upon an existing license. Thus, the Senate Committee Report also contains a memorandum from the Attorney General in which it is stated that "The section does apply, however, to licensing, with the exception that section 5(c), relating to the separation of functions, does not apply in determining applications for initial licenses, i.e., original licenses as contradistinguished from renewals or amendments of existing licenses." Sen. Rep. p. 40 (Sen. Doc. p. 226). In referring to "amendments", the quoted language contemplated amendments or modifications imposed by the agency on the ground that in such proceedings, as in renewal proceedings, the issues would often relate to the licensee's past conduct.

It is concluded, therefore, that the exemption from the provisions of section 5(c) of proceedings to determine "applications for initial licenses" extends not only to applications for original licenses but also to applications by licensees for modification of licenses.

The exception of "proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers" originally read "in determining * * * the past reasonableness of rates". See S. 7, 79th Cong. 2nd sess., as passed by the Senate on March 12, 1946. H.R. Rep. p. 52 (Sen. Doc. p. 286). The exemption was apparently created on the ground that questions as to the past reasonableness of rates are sometimes consolidated with the making of future rates—a rule making function—and that the exception would encourage such consolidation. In the House, the exemption was broadened to include the validity or application of facilities and practices on the theory that such matters also are often consolidated with rule making. H.R. Rep. pp. 30, 52 (Sen. Doc. pp. 262, 286). However, it should be noted that the Act itself does not limit the exception to cases where there is consolidation with rule making proceedings.

Hearing officers. The first sentence of section 5(c) provides that "The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency." Section 8(a) provides that in cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to section 5(c), such as initial licensing, any other officer or officers qualified to preside at hearings pursuant to section 7) shall make the initial decision or recommended decision as the case may be. Thus, apart from the exceptions referred to above, the officer who presides at the adjudicatory hearing and hears the evidence must prepare the initial or recommended decision, as the case may be, unless he becomes unavailable (as by illness or leaving the agency). Where the hearing officer becomes unavailable to the agency, the agency may itself complete the hearing or substitute another hearing officer to do so.

The second and third sentences of section 5(c) make provision for the separation of the functions of hearing and decision from the functions of investigation and prosecution. The second sentence of section 5(c) provides that:

> Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the sup-

> ervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency.

The third sentence provides:

> No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings.

It is thus apparent that the second sentence applies generally to the hearing process or the making of the record; the third, to the decisional process or the making of the initial or recommended decision by the hearing officer. The broad purpose of the second sentence is to assure that hearings be conducted by hearing officers who have not received or obtained factual information outside the record and who are neither supervised nor directed in the conduct of the hearing by agency officials engaged in the performance of investigative or prosecuting functions. To achieve fairness and independence in the hearing process it is first provided that (except for ex parte matters) no hearing officer "shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate". That is, the officer is prohibited from obtaining or receiving evidentiary or factual information bearing on the issues unless, after notice, all parties are permitted to participate. This would apply as well to expert testimony; the officer may not informally obtain evidentiary material from such experts either during or after the hearing, any more than he may from other witnesses.

The broad purpose of the third sentence is to insure that hearing officers make initial or recommended decisions free from the participation or advice of agency personnel engaged in the performance of investigative or prosecuting functions in that or a factually related case.[6] As to the decisional process it is clear that, to insure the separation of the functions of hearing and decision from the functions of investigation and prosecution and to insure the independence of the hearing officer, he may not consult or receive advice from any employee of the agency who is engaged in the performance of investigative or prosecuting functions in that or a factually related case. Likewise, under fundamental principles of due process, he may not receive advice or opinions from private parties or their counsel, unless, after notice, all parties are permitted to participate.

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[6] The limitation of the prohibition against consultation to those who performed investigative or prosecuting functions "in that or a factually related case", should be construed literally. As this provision originally appeared in H.R. 1203, 79th Cong., 1st sess. (1945), it was a complete prohibition against consultation with investigative and prosecuting personnel, as follows: "No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency shall participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings." See Sen. Doc. p. 157.

The phrase "factually related case" connotes a situation in which a party is faced with two different proceedings arising out of the same or a connected set of facts. For example, a particular investigation may result in the institution of a cease and desist proceeding against a party as well as a proceeding involving the revocation of his license. The employees of the agency engaged in the investigation or prosecution of such a cease and desist proceeding would be precluded from rendering any assistance to the agency, not only in the decision of the cease and desist proceeding, but also in the decision of the revocation proceeding. However, they would not be prevented from assisting the agency in the decision of other cases (in which they had not engaged either as investigators or prosecutors) merely because the facts of these other cases may form a pattern similar to those which they had theretofore investigated or prosecuted.

Further, it is manifest from the third sentence of section 5(c) that the hearing officer may obtain advice from or consult with agency personnel not engaged in investigative or prosecuting functions in that or a factually related case. The agency personnel in question may include, for example, the agency heads, the supervisors of the hearing officers, and persons assigned to assist the hearing officer in analyzing the record. Permitting the hearing officer to engage with appropriate agency personnel in an analytical discussion of the record is thoroughly consistent with the purposes of the Act. A principal purpose is that the hearing be followed by an initial or recommended decision proposed by the hearing officer which will focus the parties' attention upon the issues and conclusions of law, fact and policy which, in the hearing officer's judgment, govern the case. The availability to the hearing officer of appropriate assistance and advice will result normally in a more accurate initial or recommended decision and one that better reflects the views of the agency on questions of law and policy. Thus, the parties are better advised on the real issues that must be met in the subsequent procedure before final decision. See Senate Hearings (1941) pp. 266, 465, 646, 662, 836, 1487.

The exemption for the "disposition of ex parte matters as authorized by law" would permit the hearing examiner to act without notice on such matters as requests for adjournments, continuances, and the filing of papers. Sen. Rep. p. 17; H.R. Rep. p. 30 (Sen. Doc. pp. 203, 262). Also, it would apparently permit an examiner to act *ex parte* on requests for subpenas.

The independence of hearing officers is further assured by the requirement that they shall not "be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative functions for any agency". As a practical matter this means that an agency's hearing examiners should be placed in an organizational unit apart from those to which investigative and prosecuting personnel are assigned, and that the examiners' unit should be under the supervision only of the agency itself or of agency officers who exercise no investigative or prosecuting functions. For example, if the agency's general counsel supervises the investigation and prosecution activities of the agency, the examiners' unit should not be subject to his supervision or control. However, section 5(c) would not prevent the trial examiners from being under the supervision of the general counsel where in fact the supervision of investigative and prosecuting functions is exercised by an associate or assistant general counsel who has no responsibility to the general counsel for such functions but is responsible therefor directly to the agency.

It is clear that nothing in the separation of functions requirements of section 5(c) is intended to preclude agency officials, regardless of their functions, from participating in necesary administrative arrangements, such as the efficient scheduling of hearings.

The agency. The third sentence of section 5(c) provides that "No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings." Thus, on "agency review", the agency heads, as well as the hearing examiner, will be precluded from consulting or obtaining advice from any officer or employee with respect to any case in which, or in a factually related case,[7] such officer or employee has participated in the investigation or prosecution. In other words, the views of officials who investigated and prosecuted the case (or a factually related case) must be presented to hearing examiners and to agency heads in the public proceedings, i.e., hearings or oral argument, or by requested findings, exceptions, and briefs which are served upon the parties. Before discussing the scope of these requirements, it will be useful to consider some aspects of the administrative process.

The expertise of an administrative agency is not limited to the heads of the agency; it includes also the staff of specialists through whom and with whose assistance most of the agency's functions are carried on. The issues in adjudicatory cases, while frequently less complex and with narrower policy implications than are often involved in rule making, present in many cases difficult questions of law and policy. The determination of whether an industry-wide trade practice violates the Federal Trade Commission Act, or whether a certain series of stock market transactions constitute unlawful manipulation, often involves important and difficult issues. In determining such issues, agency heads have consulted with their principal advisers and specialists. Indeed, it is clearly in the public interest that they continue to do so. Section 5(c) does not purport to isolate the agency heads from their staffs. Rather, in the interest of fair procedure, it merely excludes from any such participation in the decision of a case those employees of the agency who have had such previous participation in an adversary capacity in that or a factually related case that they may be "disabled from bringing to its decision that dispassionate judgment which Anglo-American tradition demands of officials who decide questions". Final Report, p. 56.

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[7] See discussion of "factually related case" in footnote 6.

An agency officer or employee may not participate or advise in the decision, recommended decision, or agency review of an examiner's initial decision if in that or a factually related case he performed investigative or prosecuting functions. For example, if the agency's general counsel or chief accountant engages in the performance of investigative or prosecuting functions in a case, he becomes unavailable to the agency for consultation on the decision of that or a factually related case. Of course, he could always present his views as witness or counsel in the public proceedings, including the filing of briefs.

Assuming that an agency will in many cases wish to consult with certain of its staff members, it may proceed in one of two ways. It may in a particular case consult with staff members who in fact have not performed investigative or prosecuting functions in that or a factually related case. In the alternative, the agency may find it feasible so to organize its staff assignments that the staff members whom it most frequently desires to consult will be free of all investigative and prosecuting functions. The latter method appears to offer two distinct advantages, particularly where the agency has a considerable volume of cases subject to section 5(c).

First, using the agency's general counsel for an example: If the investigation and prosecution of adjudicatory cases are performed by the legal division under his supervision, it could be argued that his personal consideration of the routine cases has been so limited that he should be permitted to advise the agency in the decision of such cases. Even assuming that this is permitted by section 5(c), it would seem to be immaterial since his counsel will not be particularly needed in the routine cases. It is in the difficult and novel cases that the agency most needs his advice, and it is in these cases that he is most likely to be consulted extensively by his subordinates. Thus, he becomes unavailable to advise the agency in the very cases in which his advice would be most useful. On the other hand, if the agency so organizes its staff that the general counsel is not responsible for the investigative and prosecuting functions, he would be regularly available to the agency for consultation on the decision of cases.[8]

Second, if an agency thus organizes its staff and, accordingly, identifies the officers with whom it is free to consult in the decision of cases subject to section 5(c), these matters can be spelled out in the agency's published rules of procedure. Such publication would, in effect, inform the public of the identity (by title or group) of the staff members who advise in the decision of such cases. In any litigation on the issue of compliance with section 5(c), the published rules, embodying an organization and division of functions in the light of section 5(c), would assist in establishing proof of compliance with the separation of functions requirements.

The last sentence of section 5(c) sets forth certain exemptions from the requirements of the subsection. These have already been discussed, except the provision that "nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency". It was pointed out that this exemption "of the agency itself or the members of the board who comprise it—is required by the very nature of administrative agencies, where the same authority is responsible for both the investigation-prosecution and the hearing and decision of cases". Sen. Rep. p. 18; H.R. Rep. p. 30 (Sen. Doc. pp. 204, 262). Thus, if a member of the Interstate Commerce Commission actively participates in or directs the investigation of an adjudicatory case, he will not be precluded from participating with his colleagues in the decision of that case. Sen. Rep. p. 41 (Sen. Doc. p. 227).

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[8] The general counsel's participation in rule making and in court litigation would be entirely compatible with his role in advising the agency in the decision of adjudicatory cases subject to section 5(c).

SECTION 5(d)—DECLARATORY ORDERS

Section 5(d) provides that "The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty." The purpose of section 5(d), like that of the Declaratory Judgment Act (28 U.S.C. 400), is to develop predictability in the law by authorizing binding determinations "which dispose of legal controversies without the necessity of any party's acting at his peril upon his own view". Final Report, p. 30.

This grant of authority to the agencies to issue declaratory orders is limited by the introductory clause of section 5 so that such declaratory orders are authorized only with respect to matters which are required by statute to be determined "on the record after opportunity for an agency hearing". In addition, if the subject matter falls within one of the numbered exceptions in the introductory clause of section 5, such as a matter in which an agency is acting as an agent for a court, section 5(d) does not apply. Sen. Rep. p. 18; H.R. Rep. p. 31 (Sen. Doc. pp. 204, 263). For example, where an agency is authorized after hearing to issue orders to cease and desist from specified illegal conduct, it may, under section 5(d), if it otherwise has jurisdiction, issue a declaratory order declaring whether or not specified facts constitute illegal conduct. On the other hand, while the Securities and Exchange Commission has long issued informal advisory interpretations through its principal officers as to whether a proposed issue of securities would be exempt from the registration requirements of the Securities Act, there is no statutory agency hearing procedure in which this question can be determined; if securities are sold without registration and the Commission believes that registration was required, it can only institute civil or criminal proceedings. Accordingly, section 5(d) does not authorize the Commission to issue declaratory orders as to whether particular securities must be registered under the Securities Act.[9]

Agencies are authorized in their "sound discretion" to issue declaratory orders. They are not required to issue such orders merely because request is made therefor. Sen. Rep. p. 18; H.R. Rep. p. 31 (Sen. Doc. pp. 204, 263). By "sound dis-

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[9] Of course, this does not affect the Securities and Exchange Commission's advisory service described above.

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cretion", it is meant that agencies shall issue declaratory orders only under such circumstances that both the public interest and the interest of the party are protected. Thus, "a necessary condition of its [declaratory order] ready use is that it be employed only in situations where the critical facts can be explicity stated, without possibility that subsequent events will alter them. This is necessary to avoid later litigation concerning the applicability of a declaratory ruling which an agency may seek to disregard because, in its opinion, the facts to which it related have changed". Final Report, p. 32. Again, since the issuance of declaratory orders is a matter of sound discretion, it is clear that an agency need not issue such orders where it appears that the questions involved will be determined in a pending administrative or judicial proceeding, or where there is available some other statutory proceeding which will be more appropriate or effective under the circumstances. More broadly, it appears that "The administrative issuance of declaratory orders would be governed by the same basic principles that govern declaratory judgments in the courts." Sen. Rep. p. 18; H.R. Rep. p. 31 (Sen. Doc. pp. 204, 263).

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SECTION 6—ANCILLARY MATTERS

Section 6 defines various procedural rights of private parties which may be incidental to rule making, adjudication, or the exercise of any other agency authority. The introductory words of section 6, "Except as otherwise provided in this Act," are intended to assure that its provisions do not override contrary provisions in other parts of the act. Thus, the opportunity for informal appearance contemplated by section 6(a) is not to be construed so as to authorize *ex parte* conferences during formal proceedings when such conferences are forbidden by other sections of the act. Sen. Rep. p. 18, H.R. Rep. p. 31 (Sen. Doc. pp. 204, 263).

Governing Definitions. The provisions of section 6 hinge to a considerable extent upon the definition of the terms "party", "person" and "agency proceeding". These terms are defined in section 2 of the act as follows:

> (b) "Person" includes individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies. "Party" includes any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding; but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes.
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> (g) "Agency proceeding" means any agency process as defined in subsections (c), (d), and (e) of this section. [Defining rule making, adjudication and licensing, respectively.]

SECTION 6(a)—APPEARANCE

Formal Appearance. The first sentence of section 6(a) provides that "Any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative." This restates existing law and practice that persons compelled to appear in person before an agency or its representative must be accorded the right to be accompanied by counsel and to consult with or be advised by such counsel. Such persons are also entitled to have counsel act as their spokesmen in argument and where otherwise appropriate. Senate Comparative Print of June 1945, p. 10 (Sen. Doc. p. 26). It is clear, of course, that this provision relates only to persons whose appearance is compelled or commanded, and does not extend to persons who appear voluntarily or in response to mere request by an agency. Where appearance is compelled, whether as a party or as a witness, the right to counsel exists.

The phrase "or, if permitted by the agency, by other qualified representative" refers to the present practice of some agencies of permitting appearance or representation in certain matters by non-lawyers, such as accountants. The phrasing of this clause, together with the last sentence of the subsection, makes it clear that nothing in the first sentence was intended to change the existing powers of agencies in this respect. See discussion, *infra* at pp. 65-6.

The second sentence of the subsection relates to the rights of "parties" to "agency proceedings". It provides that every "party" shall have the right to appear in any agency proceeding "in person or by or with counsel or other duly qualified representative."[1] The right of a party to appear personally or by or with counsel extends, in view of the definition of "agency proceeding", to proceedings involving rule making, adjudication or licensing. The identity of the "parties" is usually clear in adjudication, licensing and formal rule making proceedings. However, since the provision is not limited to formal proceedings (those governed by sections 7 and 8), but extends to informal rule making proceedings, the term "party", in the latter type of proceeding, means any person showing the requisite interest in the matters involved. Sen. Rep. p. 19; H.R. Rep. p. 31 (Sen. Doc. pp. 205, 263). It is entirely clear that this right to appear in informal rule making proceedings is limited by the nature of the procedure adopted by an agency, pursuant to section 4(b). If the agency, under section 4(b), provides interested persons an opportunity to present their views orally, the agency must allow any person with the requisite interest to appear personally or by counsel or other qualified representative. On the other hand, if the agency desires to hold informal rule making proceedings consisting of the submission of written data, views, or arguments, nothing in section 6(a) requires the agency to provide in addition for personal appearance. In other words, the second sentence of section 6(a) is not intended to limit an agency's discretion as to the type of rule making proceedings to be held in a particular case. (See opening clause of section 6: "Except as otherwise provided in this Act").

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[1] The phrase "qualified representative", as used in the second sentence of subsection 6(a), relates to non-lawyers whose appearance as representatives for others is left, as under the first sentence of the subsection, to the control of the agencies. See *infra*, pp. 65-6.

Informal Appearance. The third sentence of section 6(a) provides that "So far as the orderly conduct of public business permits, any interested person may appear before any agency or its responsible officers or employees for the presentation, adjustment, or determination of any issue, request, or controversy in any proceeding (interlocutory, summary, or otherwise) or in connection with any agency function." This sentence contemplates that interested persons may appear not only in matters involving rule making, adjudication, and licensing, but also in connection with other agency functions. This provision is not to be construed as requiring an agency to give notice of its proposed action and to invite appearances by interested persons; an agency is not required to provide an opportunity for appearance and adjustment to interested persons unless they request it. Sen. Rep. p. 19 (Sen. Doc. p. 205).

The opportunity for informal appearance contemplated by the third sentence of section 6(a) means that any person should be given an opportunity to confer or discuss with responsible officers or employees of the agency matters in which he is properly interested. This opportunity should be with a responsible officer or employee—one who can decide the matter or whose function it is to make recommendations on such matters—rather than officers or employees whose duties are merely mechanical or formal. Sen. Rep. p. 19; H.R. Rep. p. 32 (Sen. Doc. pp. 205, 264).

This provision for informal appearance is expressly limited by the subsection to "so far as the orderly conduct of public business permits." Clearly, both the right and its limitation should be construed to achieve practical and fair results. Appearance should be allowed except where it would be inconsistent with the orderly conduct of public business. A properly interested person who is permitted to appear should be accorded an opportunity to present his case or proposals to a responsible officer or employee as defined above. Repeated opportunities to present the same arguments or proposals are not required. Further, the act does not require that every interested person be permitted to follow the chain of command to the head of the agency. It was not intended to require the directors of the Reconstruction Finance Corporation, for example, to confer personally with every applicant for a loan. It is sufficient if the opportunity to confer is with an official of such status that he knows the agency's policy, and is able to bring unusual or meritorious cases to the attention of the officials who shape the policy or make final decisions.

The opportunity thus to appear "for the presentation, adjustment, or determination of any issue, request, or controversy in any proceeding"—or "in connection with any agency function" relates not only to "agency proceedings" as defined in section 2(g), but also to all other agency functions. It means, for example, that upon request any person should be allowed, where this is feasible, to present his reasons as to why a particular loan or benefit should be made or granted to him. It would also seem to mean that he can present his reasons as to why a particular controversy should be settled informally rather than in formal proceedings with attendant publicity. However, there is no requirement that the agency accept such proposals for informal settlement; if, for example, the agency believes that formal public proceedings will best serve the public interest, it is free to conduct such proceedings.

The reference to "interlocutory" or "summary" proceedings appears to be intended to provide an opportunity for informal appearance and discussion in those situations where an agency takes significant action without prior formal proceedings. H.R. Rep. p. 32 (Sen. Doc. p. 264). For example, section 609 of the Civil Aeronautics Act of 1938 (49 U. S. C. 559) provides that "In cases of emergency, any such certificate [airworthiness certificate, airman certificate, etc.] may be suspended, in whole or in part, for a period not in excess of thirty days, without regard to any requirement as to notice and hearing." Under section 6(a) of the Administrative Procedure Act, the persons who would be affected by such summary action should, if feasible, be allowed to appear and present their views on the proposed action. It is absolutely clear, however, that nothing in this subsection was intended to interfere with the primary objective of assuring safety in air travel. To the extent that the timely execution of the Administrator's duties, i.e., the "orderly conduct of public business," precludes discussion and negotiation, he need not hold such discussions.

There will doubtless be many cases in which an agency will find it necessary to notice a matter for public hearing without preliminary discussion because a statute or the subject matter or the special circumstances so require. Sen. Rep. p. 41 (Sen. Doc. p. 227).

The fourth sentence of section 6(a) provides that "Every agency shall proceed with reasonable dispatch to conclude any matter presented to it except that due regard shall be had for the convenience and necessity of the parties or their representatives." This provision merely restates a principle of good administration.

Practice Before Agencies. The last sentence of section 6(a) provides that "Nothing herein shall be construed either to grant or to deny to any person who is not a lawyer the right to appear for or represent others before any agency or in any agency proceeding." The question of the extent to which non-lawyers should be permitted to practice before administrative agencies was deliberately left to the determination of the various agencies, as heretofore. House Hearings (1945) p. 34 (Sen. Doc. p. 80); H. R. Rep. p. 32 (Sen. Doc. p. 264).

More broadly, section 6(a) leaves intact the agencies' control over both lawyers and non-lawyers who practice before them. The reports of the Senate and House Judiciary Committees contain expressions of opinion to the effect that, as to lawyers desiring to practice before an agency, the agency should normally require no more than a statement from a lawyer that he is in good standing before the courts. Sen. Rep. p. 19; H.R. Rep. p. 32 (Sen. Doc. pp. 205, 264). However, the legislative history leaves no doubt that the Congress intended to keep unchanged the agencies' existing powers to regulate practice before them. When the House Committee on the Judiciary held hearings in 1945 on H.R. 1203 (79th Cong., 1st sess.) which, under the title of S. 7, was enacted as the Administrative Procedure Act, the Committee was specifically aware of the fact that H.R. 1203 contained no provision relating to attorneys practicing before agencies, while H.R. 339, and H.R. 1117, also pending before the Committee, contained such provisions. House Hearings (1945) p. 34 (Sen. Doc. p. 80). Finally, during the House debate on S. 7, Representative Kefauver offered the following amendment to section 6:

> Any member of the bar who is in good standing and who has been admitted to the bar of the Supreme Court of the United States or of the highest court of the State of his or her residence shall be eligible to practice before any agency: Provided, however, That an agency shall for good cause be authorized by order to suspend or deny the right to practice before such agency.

The amendment was rejected by the House, apparently on the ground that the subject should be covered by separate legislation. 92 Cong. Rec. 5666-8 (Sen. Doc. pp. 401-405).

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It is clear, therefore, that the existing powers of the agencies to control practice before them are not changed by the Administrative Procedure Act. For example, an agency may exclude, after notice and opportunity for hearing, persons of improper character from practice before it, *Goldsmith* v. *Board of Tax Appeals*, 270 U.S. 117 (1926), or exclude parties or counsel from participation in proceedings by reason of unruly conduct, *Okin* v. *Securities and Exchange Commission*, 137 F. (2d) 398 (C.C.A. 2, 1943), or impose reasonable time limits during which former employees may not practice before the agency.

SECTION 6(b)—INVESTIGATIONS

The first sentence of section 6(b) provides that "No process, requirement of a report, inspection, or other investigative act or demand shall be issued, made, or enforced in any manner or for any purpose except as authorized by law." This is a restatement of existing law. Senate Comparative Print of June 1945, p. 11, Sen. Rep. p. 41 (Sen. Doc. pp. 27, 227).

The second sentence of subsection 6(b) provides that "Every person compelled to submit data or evidence shall be entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony." Under this, any person compelled to submit data or evidence, either as a party or as a witness, must be accorded the right to retain copies of written data submitted in response to a *subpena duces tecum* or other demand, or, upon payment of lawfully prescribed costs, to procure from the agency a copy of the data thus submitted or a transcript of the oral testimony which he was required to give. This right, it will be noted, is limited to the data and evidence submitted by the particular witness, and does not entitle him to copies or transcripts of the data and evidence submitted by other persons. Moreover, it extends only to persons "compelled" to testify or to submit data, and not to those who are merely requested to do so or who do so voluntarily.

The right defined in the second sentence of section 6(b) is subject to the limitation "That in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony." In the Committee reports, it is stated that this limitation was deemed necessary "where evidence is taken in a case in which prosecutions may be brought later and it is obviously detrimental to the due execution of the laws to permit copies to be circulated." Sen. Rep. p. 19, H.R. Rep. p. 33 (Sen. Doc. pp. 205, 265). Thus, the phrase "non-public investigatory proceeding" covers all confidential phases of investigations, formal or informal, conducted by agencies to determine whether there have been violations of law. In such situations, the witness may be limited to inspection of such portions of the transcript of investigation as contain his own testimony. This right to inspect the transcript extends only to persons who have been compelled to testify.

SECTION 6(c)—SUBPENAS

The first sentence of section 6(c) provides that "Agency subpenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought." The purpose of this provision is to make agency subpenas available to private parties to the same extent as to agency representatives. Sen. Rep. p. 20, H.R. Rep. p. 33 (Sen. Doc. pp. 206, 265); 92 Cong. Rec. 5652 (Sen. Doc. p. 363). It applies to both subpenas *ad testificandum* and subpenas *duces tecum*. It should be emphasized that section 6(c) relates only to existing subpena powers conferred upon agencies; it does not grant power to issue subpenas to agencies which are not so empowered by other statutes. Senate Comparative Print of June 1945, p. 14 (Sen. Doc. pp. 29-30).

The subsection requires the issuance of subpenas to any party "upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought." It may be argued from the quoted language that agency subpenas must be issued merely upon request of a party unless the agency requires, by its published procedural rules, a "statement or showing of general relevance and reasonable scope of the evidence sought"; accordingly, each agency which is empowered to issue subpenas should issue rules of procedure stating the manner in which parties are to request subpenas and the contents of such requests. The standard of "general relevance and reasonable scope" should be interpreted and applied in the light of the statutory purpose of making administrative subpenas equally available to private parties and agency representatives. (See the second sentence of section 12). On the other hand, agencies should consider that subpenas which it may issue to aid private parties, like subpenas issued to assist the agencies themselves, are subject to the legal requirements and limitations restated in the second sentence of section 6(c). Thus, agencies may refuse to issue to private parties subpenas which appear to be so irrelevant or unreasonable that a court would refuse to enforce them.

The right to subpenas stated in section 6(c) is limited to "parties", as defined in section 2(b). Accordingly, the right to administrative subpenas is applicable to parties to rule making, adjudication and licensing proceedings.

The Act is silent as to the responsibility for payment of fees to witnesses called by private parties pursuant to subpenas issued by an agency.[2] It was apparently thought that such a provision should be the subject of separate legislation. Senate Comparative Print of June 1945, p. 11 (Sen. Doc. p. 28). In view of this, it appears that the question of payment of witness fees may be dealt with by reasonable administrative regulations such as many agencies have already adopted.[3]

The second sentence of section 6(c) provides that "Upon contest the court shall sustain any such subpena or similar process or demand to the extent that it is found to be in accordance with law and, in any proceeding for enforcement, shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply." Upon its face, the subsection in requiring judicial enforcement of subpenas "found to be in accordance with law" is a reference to and an adoption of the existing law with respect to subpenas. For example, nothing in section 6(c) seems intended to change existing law as to the reasonableness and scope of subpenas. Similarly, the subsection leaves unchanged existing law as to the scope of judicial inquiry where enforcement of a subpena is sought. In *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501 (1943), the Supreme Court held that where the Secretary of Labor sought judicial enforcement of a subpena issued in a proceeding under the Walsh-Healey Public Contracts Act, the District Court was not authorized to determine whether the respondent was subject to that act, as a condition precedent to enforcement of the subpena. Accord, under the Fair Labor Standards Act, *Oklahoma Press Publishing Company* v. *Walling*, 327 U.S. 186 (1946). Nothing in the language of section 6(c) suggests any purpose to change this established rule. It is said only that the court shall enforce a subpena "to the extent that it is found to be in accordance with law." "Law" refers to the statutes which a particular agency administers, together with relevant judicial decisions.

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[2] Section 10 of the Act of August 2, 1946 (Public Law 600, 79th Cong., 2d sess.) provides that "Whenever a department is authorized by law to hold hearings and to subpena witnesses for appearance at said hearings, witnesses summoned to and attending such hearings shall be entitled to the same fees and mileage, or expenses in the case of Government officers and employees, as provided by law for witnesses attending in the United States courts."

[3] The following examples appear to be reasonable and appropriate:
Federal Power Commission—Rules of Practice Under the Federal Power Act.

Rule 1.131. "Fees of witnesses.—Witnesses who are summoned are entitled to the same fees as are paid for like services in the courts of the United States, such fees to be paid by the party at whose instance the testimony is taken, and the Commission before issuing subpoena may require a deposit of an amount adequate to cover the fees and milage involved." [16 U.S.C. 825f].
Interstate Commerce Commission—Rules of Practice.

Rule 56(e). "Witness fees. A witness who is summoned and responds thereto is entitled to the same fee as is paid for like service in the courts of the United States, such fee to be paid by the party at whose instance the testimony is taken at the time the subpena is served." [49 U.S.C. 18].

This natural and literal construction of the second sentence of section 6(c) finds conclusive support in the legislative history of the provision. When S. 7 was introduced by Senator McCarran on January 6, 1945, section 6(c) provided that "Upon any contest of the validity of a subpena or similar process or demand, the court shall determine all relevant questions of law raised by the parties, *including the authority or jurisdiction of the agency.*" (Italics supplied). Clearly this language could be construed as intended to change the rule stated in *Endicott Johnson Corp.* v. *Perkins, supra.* However, when S. 7 was reported by the Senate Committee on the Judiciary on November 19, 1945 (Sen. Rep. p. 34 (Sen. Doc. p. 220)), section 6 was rephrased in its present form. This significant change in language, as well as the natural and literal reading of section 6(c), is persuasive that the subsection leaves unchanged the scope of judicial inquiry upon an application for the enforcement of a subpena. See also Sen. Rep. p. 41 (Sen. Doc. p. 227); 92 Cong. Rec. A2988 (Sen. Doc. p. 415).

SECTION 6(d)—DENIALS

Section 6(d) provides that "prompt notice shall be given of the denial in whole or in part of any written application, petition, or other request of any interested person made in connection with any agency proceeding. Except in affirming a prior denial or where the denial is self-explanatory, such notice shall be accompanied by a simple statement of procedural or other grounds." This requirement relates to applications, petitions and requests made by "interested persons" in connection with any "agency proceeding", i.e., rule making, adjudication and licensing proceedings. It applies to such proceedings regardless of whether they are formal or informal. Sen. Rep. p. 20, H.R. Rep. p. 33 (Sen. Doc. pp. 206, 265). As in the case of section 4(d), an "interested person" may be defined generally as one whose interests are or will be affected by the agency action which may result from the proceeding. It is clear that with respect to formal proceedings, the only interested persons are those who are "parties" to such proceedings within the meaning of section 2(b).

Section 6(d) has no application to matters which do not relate to rule making, adjudication or licensing. Generally, it is not applicable to the mass of administrative routine unrelated to those proceedings.

The prompt notice of denial required by section 6(d) may be given in writing, addressed to the applicant, or orally (e.g., in the case of a proceeding conducted by an examiner). The required statement of grounds for denial, while simple in nature, must be sufficient to advise the party of the general basis of the denial.

Where the denial is self-explanatory or affirms a previous denial, it need not be accompanied by a statement of reasons; in such cases, it is assumed that the applicant has knowledge of the grounds for denial.

VI

SECTION 7—HEARINGS

The provisions of section 7 govern the conduct of hearings in those cases of rule making and adjudication which are required by sections 4 and 5 to be conducted in accordance with sections 7 and 8. The requirements of section 7 are closely integrated with those of sections 5(c) (as to certain types of adjudication) and 8. Section 7, together with sections 5(c) and 8, became effective on December 11, 1946, and is applicable to proceedings commenced on and after that date. See section 12.

SECTION 7(a)—PRESIDING OFFICERS

The first sentence of section 7(a) provides that "There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute."

Inasmuch as the provisions of section 11 relating to the selection and status of hearing examiners did not become effective until June 11, 1947 (see section 12), it is obvious that until then the agencies could continue to utilize their usual hearing examiners or officers, in compliance, of course, with the other requirements of sections 5(c), 7 and 8.

The last clause of the sentence is designed to permit agencies to continue to utilize hearing officers or boards "specially provided for by or designated pursuant to statute." An earlier draft referred to "other officers specially designated by statute." See Senate Comparative Print, June 1945 pp. 12-13 (Sen. Doc. p. 28). Under the original language, it might have been necessary for such an officer to be designated specifically by a statute to conduct a particular hearing, e.g., in the manner that 19 U.S.C. 1641 requires that hearings to determine whether a customhouse broker's license should be suspended or revoked must be held by the collector or chief officer of the customs. Under the present broader language, the exception will also apply if a statute authorizes the agency to designate a specific officer or employee or one of a specific class of officers or employees to conduct the hearing. Examples of statutory provisions for hearing officers who may be utilized without regard to section 11 are: (1) joint hearings before officers of Federal agencies and persons designated by one or more States (e.g., section 13(3) of the Interstate Commerce Act, 49 U.S.C. 13(3)), as well as hearings before joint State boards under section 209(a) of the Federal Power Act (16 U.S.C. 824h), (2) where officers of more than one agency sit, as joint boards composed of members of the Interstate Commerce Commission and the Civil Aeronautics Board pursuant to section 1003 of the Civil Aeronautics Act (49 U.S.C. 643), (3) quota review committees under the Agricultural Adjustment Act of 1938 (7 U.S.C. 1363), and (4) boards of employees under the Interstate Commerce Act (49 U.S.C. 17(2)). Sen. Rep. pp. 41-42, (Sen. Doc. pp. 227-228). A statutory provision which merely provides for the conduct of hearings by any officers or employees the agency may designate, does not come within the exception so as to authorize the agency to dispense with hearing examiners appointed in accordance with section 11. H.R. Rep. p. 34 (Sen. Doc. p. 268).

Generally, whoever presides at the hearing (whether an examiner appointed pursuant to section 11, a member of the agency or a special statutory board or hearing officer) is subject to the remaining provisions of the Act. Sen. Rep. p. 21; H.R. Rep. p. 34 (Sen. Doc. pp. 207, 268). However, where a member of the agency acts as presiding officer, the exception in the last clause of section 5(c) applies, with the result that he is not disqualified, as an examiner would be, by previous participation in the investigation of the case. Similarly, a statute requiring or authorizing a hearing to be conducted by a particular board or officer may have the further effect of requiring such board or officer to participate in the investigation or prosecution or of placing the board or officer under the supervision or direction of investigating or prosecuting officials. See 19 U.S.C. 1641. In the latter case, it would seem that to the extent the general requirements of section 5(c) are inconsistent they are inapplicable.

The second sentence of section 7(a) provides that "The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner." This means, of course, that "They must conduct the hearing in a strictly impartial manner, rather than as the representative of an investigative or prosecuting authority, but this does not mean that they do not have the authority and duty—as a court does—to make sure that all necessary evidence is adduced and to keep the hearing orderly and efficient." Sen. Rep. p. 21, H.R. Rep. p. 34 (Sen. Doc. pp. 207, 268). This is not intended to prohibit a hearing officer from questioning witnesses and otherwise encouraging the making of a complete record.

The third sentence of section 7(a) provides that "Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case." This provision authorizes any presiding officer to withdraw from a proceeding if he considers himself disqualified, for example, as being related to a party. In addition, a party may, by the "filing in good faith of a timely and sufficient affidavit", present to the agency the issue of the "personal bias or disqualification of any such officer"; thereupon "the agency shall determine the matter as a part of the record and decision in the case". Hearings are not required on every charge of bias or disqualification of a presiding officer.[1] If the affidavit is insufficient upon its face, it may be dismissed summarily. In other cases, the agency may consider it appropriate to investigate the charge itself or by another hearing officer. In any event, the agency's decision and the proceedings upon such an affidavit must be made a part of the record of the case in which the affidavit is filed. Sen. Rep. pp. 21, 42, H.R. Rep. p. 35 (Sen. Doc. pp. 207, 228, 269).

If a court in reviewing the agency's final action finds, contrary to the agency, that the hearing officer was biased or disqualified, the agency action based upon the recommended or initial decision made by such officer is not thereby automatically void; rather, the question is whether the private party was prejudiced by such error. See last sentence of section 10(e). The consequences of such bias or disqualification on the part of a presiding officer are alluded to in the reports of the Senate and House Committees on the Judiciary as follows: "The effect which bias or disqualification shown upon the record might have would be determined by the ordinary rules of law and the other provisions of this bill. If it appeared or were discovered late, it would have the effect—where issues of fact or discretion were important and the conduct and demeanor of witnesses relevant in determining them—of rendering the recommended decisions or initial decisions of such officers invalid." Sen. Rep. p. 21, H.R. Rep. p. 35 (Sen. Doc. pp. 207, 269).

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[1] This is emphasized by the fact that an earlier draft of the bill required such hearings. See Senate Comparative Print, June 1945, p. 13 (Sen. Doc. p. 158).

SECTION 7(b)—HEARING POWERS

Section 7(b) provides that "Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act."

The quoted language automatically vests[2] in hearing officers the enumerated powers to the extent that such powers have been given to the agency itself, i.e., "within its powers." In other words, not only are the enumerated powers thus given to hearing officers by section 7(b) without the necessity of express agency delegation, but an agency is without power to withhold such powers from its hearing officers. This follows not only from the statutory language, "shall have authority", but from the general statutory purpose of enhancing the status and role of hearing officers. Thus, in the Senate Comparative Print of June 1945, p. 14 (Sen. Doc. p. 29), it is stated that "The statement of the powers of administrative hearing officers is designed to secure that responsibility and status which the Attorney General's Committee stressed as essential (Final Report, pp. 43-53 particularly at pp. 45-46 and 50)." See also Sen. Rep. p. 21, H.R. Rep. p. 35, 92 Cong. Rec. 2157 (Sen. Doc. pp. 207, 269, 319-320); cf. Sen. Rep. p. 42 (Sen. Doc. p. 228).

As noted above, the subsection vests in hearing officers only such of the enumerated powers as the agency itself possesses. If an agency lacks the authority to issue subpenas, subsection 7(b) does not grant the subpena power to that agency's hearing officers. Senate Comparative Print, June 1945, p. 14 (Sen. Doc. pp. 29-30). The phrase "subject to the published rules of the agency" is intended to make clear the authority of the agency to lay down policies and procedural rules which will govern the exercise of such powers by presiding officers. Senate Hearings (1941) pp. 653, 1457-1458. For example, if an agency provides by rule that the fact of citizenship must be established in a prescribed manner, the hearing officer must conform to such rule in exercising his power to "rule upon offers of proof and receive relevant evidence". Similarly, if an agency provides that subpenas duces tecum shall be issued only upon written application specifying the documents desired and their relevance, the hearing officer is bound to comply.

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[2] Since section 7(b) itself vests these powers (including the subpena power) in hearing officers. *Cudahy Packing Co. v. Holland*, 315 U.S. 357 (1942), and *Fleming v. Mohawk Co.*, 331 U. S. 111 (1947), dealing with the authority of agencies to delegate such powers, have no application here.

Agencies remain free to provide for appeals to the agency heads from rulings of hearing officers in the exercise of the powers enumerated in section 7(b). For example, when a ruling excluding certain evidence, if reversed by the agency, would necessitate reopening of the hearing and recalling witnesses, it may be desirable to permit an immediate appeal from the ruling.

SECTION 7(c)—EVIDENCE

Burden of proof. The first sentence of section 7(c) provides that "Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof." In the Senate Comparative Print, June 1945, p. 15 (Sen. Doc. p. 31), it is stated that "The provision relating to burden of proof is the standard rule." There is some indication that the term "burden of proof" was not employed in any strict sense, but rather as synonymous with the "burden of going forward".[3] In either case, it is clear from the introductory clause that this general statement was not intended to repeal specific provisions of other statutes which, as by establishing presumptions, alter what would otherwise be the "burden of proof" or the "burden of going forward". Sen. Rep. p. 42 (Sen. Doc. p. 228).

Evidence. The second sentence of section 7(c) provides that "Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence."

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[3] Thus, in Sen. Rep. p. 22 (Sen. Doc. p. 208), it is stated: "That the proponent of a rule or order has the burden of proof means not only that the party initiating the proceeding has the general burden of coming forward with a prima facie case but that other parties, who are proponents of some different result, also for that purpose have a burden to maintain." See also H.R. Rep. p. 36 (Sen. Doc. p. 270).

Under section 7(c) it is clear that, as heretofore, the technical rules of evidence will not be applicable to administrative hearings. See also Final Report, p. 70. Thus, it is stated that "the mere admission of evidence is not to be taken as prejudicial error (there being no lay jury to be protected from improper influence) although irrelevant, immaterial, and unduly repetitious evidence is useless and is to be excluded as a matter of efficiency and good practice." H.R. Rep. p. 36, Sen. Rep. p. 22 (Sen. Doc. pp. 270, 208). To carry out this policy, it is advisable that each agency direct its hearing officers to exclude from the record so far as practicable irrelevant, immaterial or unduly repetitious evidence.

Agency action must be supported by "reliable, probative, and substantial evidence." It is said that "These are standards or principles usually applied tacitly and resting mainly upon common sense which people engaged in the conduct of responsible affairs instinctively understand." H.R. Rep. p. 36, Sen. Rep. p. 22 (Sen. Doc. pp. 270, 208). This restates the present law. H.R. Rep. p. 53, fn. 18 (Sen. Doc. p. 287); *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U.S. 197, 230 (1938); Senate Comparative Print, p. 14 (Sen. Doc. p. 31). It is clear that nothing in section 7(c) is intended to change the standard or scope of judicial review; section 10(e)(5) specifically restates the "substantial evidence rule", as developed by the Congress and the courts, under which the reviewing court ascertains whether the agency's findings of fact are supported by substantial evidence.

Nothing in section 7(c) is intended to preclude an agency from imposing reasonable requirements as to how particular facts must be established—such as age, citizenship, marital status, etc. Nor is an agency forbidden to draw such inferences or presumptions as the courts customarily employ, such as the failure to explain by a party in exclusive possession of the facts, or the presumption of continuance of a state of facts once shown to exist.

Furthermore, section 7(c) does not repeal provisions of other statutes which establish certain presumptions of fact.[4]

Presentation of evidence. Section 7(c) provides further that "Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." It is concluded that the provision is intended to emphasize the right of parties in cases of adjudication (other than determining claims for money or benefits or applications for initial licenses) to present their evidence orally, and in addition to present such "documentary evidence" as would be admissible in judicial proceedings, such as writings and records made in regular course of business. 28 U.S.C. 695. As here used "documentary evidence" does not mean affidavits and written evidence of any kind. Such a construction would flood agency proceedings with hearsay evidence. In the last sentence of the subsection, there appears the phrase "evidence in written form," thus indicating that the Congress distinguished between "written evidence" and "documentary evidence." See also section 203(c) of the Emergency Price Control Act. Again, the subsection expressly states the right to adequate cross-examination. Against this background, it is clear that the "right to present his case or defense by oral or documentary evidence" does not extend to presenting evidence in affidavit or other written form so as to deprive the agency or opposing parties of opportunity for cross-examination, nor so as to force them to assume the expense of calling the affiants for cross-examination. See *Powhatan Mining Co.* v. *Ickes*, 118 F. 2d 105, 109 (C.C.A. 6, 1941).

Of course, the agency may, if it desires, receive such written evidence as it determines would tend to be reliable and probative and the admission of which would not prejudicially deprive other parties or the agency of opportunity for cross-examination. Thus, technical and statistical data may be introduced in convenient written form subject to adequate opportunity for cross-examination and rebuttal. Sen. Rep. p. 42, H.R. Rep. p. 37 (Sen. Doc. pp. 228, 271). Any evidence may be admitted by agreement or if no objection is made. *Opp Cotton Mills, Inc.* v. *Administrator,* 312 U.S. 126, 155 (1941).

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[4] For example, section 20(d) of the Longshoremen's and Harbor Workers' Compensaton Act (33 U.S.C. 920(d)), provides that "In any proceedings for the enforcement of a claim for compensation it shall be presumed, in the absence of substantial evidence to the contrary—(d) that the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another." See *Del Vecchio* v. *Bowers*, 296 U.S. 280 (1935). See also section 2(a)9 of the Investment Company Act of 1940 (15 U.S.C. 80a-2(9)).

The provision for "such cross-examination as may be required for a full and true disclosure of the facts" does not, according to the House Committee Report, "confer a right of so-called 'unlimited' cross-examination. Presiding officers will have to make the necessary initial determination whether the cross-examination is pressed to unreasonable lengths by a party or whether it is required for the 'full and true disclosure of the facts' stated in the provision. Nor is it the intention to eliminate the authority of agencies to confer sound discretion upon presiding officers in the matter of its extent. The test is—as the section states—whether it is required 'for a full and true disclosure of the facts.' In many rule making proceedings where the subject matter and evidence are broadly economic or statistical in character and the parties or witnesses numerous, the direct or rebuttal evidence may be of such a nature that cross-examination adds nothing substantial to the record and unnecessarily prolongs the hearings." H.R. Rep. p. 37 (Sen. Doc. p. 271).

In proceedings involving rule making or determining claims for money or benefits or applications for initial licenses, an agency may adopt procedures for the submission of all or part of the evidence in written form. Thus, in rate making and licensing proceedings, which frequently involve extensive technical or statistical data, the agency may require that the mass of such material be submitted in orderly exhibit form rather than be read into the record by witnesses. Similarly, in determining claims for money or benefits, the agency may require that the papers filed in support of the application contain the factual material. Such procedures may be required only "where the interest of any party will not be prejudiced thereby." Typically, in these cases, the veracity and demeanor of witnesses are not important. It is difficult to see how any party's interests would be prejudiced by such procedures where sufficient opportunity for rebuttal exists. However, "To the extent that cross-examination is necessary to bring out the truth, the party should have it." Sen. Rep. p. 23, H.R. Rep. p. 37 (Sen. Doc. pp. 209, 271). Such is the present practice of such agencies as the Civil Aeronautics Board, which has made extensive use of written evidence procedures to simplify records and shorten formal hearings.

SECTION 7(d)—RECORD

Record. The first sentence of section 7(d) provides that "The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties." The record must include any agency proceedings upon an affidavit of personal bias or disqualification of a hearing officer pursuant to section 7(a). All decisions (initial, recommended or tentative) are required by section 8(b) to be made a part of the record. It is believed, by analogy to judicial practice, that the subsection does not require the transcription of oral arguments for inclusion in the record.

In the interests of economy, certain agencies have followed the practice of not transcribing the stenographic record of the hearing unless there is an appeal from the decision of the officer presiding at the hearing. Section 7(d) does not require an agency to have the record transcribed automatically in every case, but it does require transcription in any case where a party demands a copy of the record, so that it will be available to him "upon payment of lawfully prescribed costs." This requirement is satisfied by the present agency practice of contracting with private stenographic agencies for reporting service on terms that enable parties to obtain copies at a reasonable price.

Official notice. The second sentence of section 7(d) provides that "Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary." In the Senate Comparative Print, June 1945, p. 15 (Sen. Doc. p. 32), it is stated that "The rule of official notice is that recommended by the Attorney General's Committee, particularly the safeguard that parties be apprised of matters so noticed and accorded an 'opportunity for reopening of the hearing in order to allow the parties to come forward to meet the facts intended to be noticed.' (Final Report pp. 71-73)." The recommendation of the Attorney General's Committee, which is thus apparently adopted was that "the permissible area of official notice be extended" so as to avoid "laborious proof of what is obvious and notorious," subject to opportunity for rebuttal or explanation, as provided in section 7(d). See the excellent discussion in Final Report, pp. 71-73, pointing out that the process of official notice should not be limited to the traditional matters of judicial notice but extends properly to all matters as to which the agency by reason of its functions is presumed to be expert, such as technical or scientific facts within its specialized knowledge. Cf. H.R. Rep. p. 38 (Sen. Doc. p. 272).

Agencies may take official notice of facts at any stage in a proceeding—even in the final decision[5]—but the matters thus noticed should be specified and "any party shall on timely request be afforded an opportunity to show the contrary." The matters thus noticed become a part of the record and, unless successfully controverted, furnish the same basis for findings of fact as does "evidence" in the usual sense.

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[5] "Where agencies take such notice they must so state on the record or in their decisions and then afford the parties an opportunity to show the contrary." Sen. Rep. p. 23, H.R. Rep. pp. 37-38 (Sen. Doc. pp. 209, 271). If official notice is taken of facts in the course of the final decision, the proceeding need not be reopened automatically, but the parties will be entitled to request reopening for the purpose of contesting the facts thus officially noticed by the agency.

VII

SECTION 8—DECISIONS

The provisions of section 8, together with those of section 5(c), govern the procedure subsequent to hearing. Section 8 applies to cases of rule making and adjudication which are required by sections 4 and 5 to be conducted in accordance with sections 7 and 8. It became effective on December 11, 1946, and is applicable to proceedings commenced on and after that date. See section 12.

SECTION 8(a)—WHO DECIDES

Section 8(a) provides for intermediate and final decisions, prescribes who shall make them, and defines the decisional relationship between the agency heads and presiding officers.[1] The subsection reads as follows:

> *Action by subordinates.* In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to section 7) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires.

At the outset, it should be noted that section 8(a) has no application to cases in which the agency itself has presided at the reception of the evidence. The procedures required by this subsection are intended "to bridge the gap between the officials who hear and those who decide cases." H.R. Rep. p. 38 (Sen. Doc. p. 272). If the agency itself, e.g., the Interstate Commerce Commission, hears the evidence, it may decide the case without the use of any intermediate decision. In such cases, however, the agency may, if it desires, preface its final decision with a tentative decision to which the parties may file exceptions.

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[1] Any of the requirements of section 8 may be waived by the parties. Sen. Rep. p. 23 (Sen. Doc. p. 209).

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In cases of adjudication subject to section 5(c) and in which the agency itself has not presided at the reception of evidence, the presiding officer[2] must "initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision." It is further provided that "Whenever the agency makes the initial decision without having presided at the reception of the evidence [the presiding officer] shall first recommend a decision." That is, in cases of adjudication subject to section 5(c), the presiding officer must make either (a) an "initial" decision which will become the agency's final decision in the absence of an appeal to or review by the agency, or (b) a "recommended" decision which will be followed by an "initial" decision by the agency.

Under the terms of the subsection, the presiding officer's decision will constitute an initial decision unless the agency provides otherwise either by general rule published in the Federal Register or by order in the particular case. Accordingly, each agency should determine whether it desires the decisions of its presiding officers to be "initial" decisions or recommended decisions.

In cases not subject to section 5(c), the agency may provide for the making of initial decisions by "any other officer or officers qualified to preside at hearings pursuant to section 7." That is, in rule making, in "determining applications for initial licenses," and in "proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers," an "initial" decision may be made, for example, by a hearing examiner other than the one who heard the evidence. Further, the fourth sentence of section 8(a) provides that in rule making and in determining applications for initial licenses the agency may issue a tentative decision or *any* of its responsible officers may recommend a decision in lieu of a recommended decision by the hearing examiner who conducted the hearing. This last clause permits, in rule making and determining applications for initial licenses, "the continuation of the widespread agency practice of serving upon the parties, as a substitute for either an examiner's report or a tentative agency report, a report prepared by the staff of specialists and technicians normally engaged in that portion of the agency's operations to which the proceeding in question relates." Sen. Rep. p. 43[3] (Sen. Doc. p. 229).

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[2] As here used, presiding officer means the member of the agency, the examiner appointed pursuant to section 11, or the special statutory board or hearing officer who conducted the hearing. See section 7(a). Where the presiding officer becomes unavailable as by illness or leaving the agency, the agency may direct another hearing officer to make an initial or recommended decision, or it may issue a tentative decision, or it may order a rehearing.

Finally, in rule making or determining applications for initial licenses, the agency may itself decide the case without any prior initial, recommended or tentative decision, even though it has not presided at the reception of the evidence, "in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires."

Appeals and review. Where the agency permits a hearing officer to make an "initial" decision, "in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency." Parties may appeal from the hearing officer's initial decision to the agency, which must thereupon itself consider and decide the case. Also, the agency may review the hearing officer's initial decision even though the parties fail to appeal. Each agency should publish a rule prescribing the time within which parties may appeal or the agency may call up the case for review.[4] Where the hearing examiner (or other officer where permitted by the subsection) makes a recommended decision, the agency must always make an "initial" or final decision.

In making its decision, whether following an initial or recommended decision, the agency is in no way bound by the decision of its subordinate officer; it retains complete freedom of decision—as though it had heard the evidence itself. This follows from the fact that a recommended decision is advisory in nature. See *National Labor Relations Board* v. *Elkland Leather Co.*, 114 F. 2d 221, 225 (C.C.A. 3, 1940), certiorari denied, 311 U.S. 705. Similarly, the third sentence of section 8(a) provides that "On appeal from or review of the initial decisions of such [hearing] officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision." This is not to say that hearing examiners' initial or recommended decisions are without effect. "They become a part of the record [as required by subsection 8(b)] and are of consequence, for example, to the extent that material facts in any case depend on the determination of credibility of witnesses as shown by their demeanor or conduct at the hearing." Sen. Rep. p. 24, H.R. Rep. p. 38 (Sen. Doc. pp. 210, 272). In such cases, it is apparently assumed that agencies will attach considerable weight to the findings of the examiner who saw and heard the witnesses. However, in cases where the credibility of witnesses is not a material factor, or cases where the recommended or initial decision is made by an officer other than the one who heard the evidence, the function of such decision will be, rather, the sharpening of the issues for subsequent proceedings.

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[3] It is to be noted that in "proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers" (if they do not constitute either rule making or the determination of an application for an initial license), an intermediate (i.e., "initial" or "recommended") decision must be made by the hearing examiner who conducted the hearing or by some other officer or officers qualified to preside at hearings pursuant to section 7(a).

[4] It is important to note that section 10(c) permits an agency to require parties to appeal from hearing officers' initial decisions to the agency as a prerequisite to obtaining judicial review. Such a requirement must be set forth in a published rule which must further provide that the hearing officer's initial decision shall be inoperative pending the agency's review of the case. Sen. Rep. p. 27, H.R. Rep. pp. 43, 55, fn. 21 (Sen. Doc. pp. 213, 277, 289).

Section 8(a) empowers agencies to "limit the issues upon notice or by rule" on appeal from or review of the *initial* decisions of hearing officers. That is, an agency may limit the issues which it will consider in such cases by notice in a particular case or by a general rule published in the Federal Register. It may restrict its review to questions of law and policy or, where it is alleged that erroneous findings of fact have been made by the hearing officer, to determining whether cited portions of the record disclose that the findings are clearly wrong. Final Report, p. 51. See also Sen. Rep. p. 43 (Sen. Doc. p. 229).

Where the hearing officer makes a recommended decision, the agency must itself consider and determine all issues properly presented. However, it may provide that it will consider only such objections to its subordinates' decisions (recommended or initial) as are presented to it as exceptions to such decisions. See *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U.S. 253, 255 (1943); *National Labor Relations Board* v. *Cheney California Lumber Co.*, 327 U.S. 385, 387-88 (1946). It may also require that exceptions be precise and supported by specific citations to the record.[5] The agency in reviewing either initial or recommended decisions may adopt in whole or in part the findings, conclusions and basis therefor stated by the presiding officer. On the other hand, it may make entirely new findings either upon the record or upon new evidence which it takes. Also, it may remand the case to the hearing officer for any appropriate further proceedings. Sen. Rep. p. 43, H.R. Rep. pp. 38-39 (Sen. Doc. pp. 229, 272-273).

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[5] See Final Report, p. 52: "The Committee strongly urges that the agencies abandon the notion that no matter how unspecified or unconvincing the grounds set out for appeal, there is yet a duty to reexamine the record minutely and reach fresh conclusions without reference to the hearing commissioner's decision. Agencies should insist upon meaningful content and exactness in the appeal from the hearing commissioner's decision and in the subsequent oral argument before the agency. Too often, at present, exceptions are blanket in character, without reference to pages in the record and without in any way narrowing the issues. They simply seek to impose upon the agency the burden of complete reexamination. Review of the hearing commissioner's decision should in general and in the absence of clear error be limited to grounds specified in the appeal."

SECTION 8(b)—SUBMITTALS AND DECISIONS

Submittals. The first sentence of section 8(b) provides that "Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, *or* (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions." [Italics supplied]. The procedure thus prescribed for the focusing of issues and arguments is a codification of the present general practice. Senate Comparative Print, June 1945, p. 16 (Sen. Doc. p. 33). "Ordinarily proposed findings and conclusions are submitted only to the officers making the initial [or recommended] decision, and the parties present exceptions thereafter if they contest the result. However, such exceptions may in form or effect include proposed findings or conclusions for the reviewing authority to consider as part of the exceptions." Sen. Rep. pp. 24, 43 (Sen. Doc. pp. 210, 229).

Agencies may require that proposed findings and conclusions and exceptions be supported by precise citation of the record or legal authorities as the case may be. Reasonable time limits for the submission of such materials may be imposed. The opportunity to submit supporting reasons means that briefs on the law and facts which are filed by parties in support of their proposed findings and conclusions and exceptions must be received and considered. Sen. Rep. p. 24, H.R. Rep. p. 39 (Sen. Doc. pp. 210, 273). Section 8(b) does not purport to prescribe opportunities for oral argument. Accordingly, subject to the provisions of particular statutes, each agency must itself determine in what cases oral argument before hearing officers or the agency is necessary or appropriate.[6]

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[6] See *Morgan* v. *United States*, 298 U.S. 468, 481 (1936): "Argument may be oral or written."

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Decisions. Section 8(b) further provides: "The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof."

Since all decisions, whether made by the agency or by a subordinate officer, become a part of the record, the requirement of the first quoted sentence will be satisfied if such decisions in some way indicate the ruling of the agency or such officer upon each requested finding or conclusion or exception presented to the agency or to such officer. The purpose of this requirement is "to preclude later controversy as to what the agency had done." H.R. Rep. p. 54, fn. 19 (Sen. Doc. p. 288).

The form and content of decisions, as prescribed in the last sentence of section 8(b), are discussed in the Committee reports as follows:

> The requirement that the agency must state the basis for its findings and conclusions means that such findings and conclusions must be sufficiently related to the record as to advise the parties of their record basis. Most agencies will do so by opinions which reason and relate the issues of fact, law, and discretion. Statements of reasons, however, may be long or short as the nature of the case and the novelty or complexity of the issues may require.
>
> Findings and conclusions must include all the relevant issues presented by the record in the light of the law involved. They may be few or many. A particular conclusion of law may render certain issues and findings immaterial, or vice versa. Where oral testimony is conflicting or subject to doubt of its credibility, the credibility of witnesses would be a necessary finding if the facts are material. It should also be noted that the relevant issues extend to matters of administrative discretion as well as of law and fact. This is important because agencies often determine whether they have power to act rather than whether their discretion should be exercised or how it should be exercised. Furthermore, without a disclosure of the basis for the exercise of, or failure to exercise, discretion, the parties are unable to determine what other or additional facts they might offer by way of rehearing or reconsideration of decisions. Sen. Rep. pp. 24-25, H.R. Rep. p. 39. (Sen. Doc. pp. 210-211, 273).

An agency which issues opinions in narrative and expository form may continue to do so without making separate findings of fact and conclusions of law. However, such opinions must indicate the agency's findings and conclusions on material issues of fact, law or discretion with such specificity "as to advise the parties and any reviewing court of their record and legal basis."[7] The requirement that such decisions indicate the reasons for the exercise of discretionary power is a codification of existing good practice. See *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U.S. 177, 194-197 (1941).

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[7] Agencies should keep in mind that pursuant to section 3(b) they may cite as precedents only such previous orders and opinions as have been published or made available for public inspection.

Nothing in the Act is intended to preclude agency heads from utilizing the services of agency employees as assistants for analysis and drafting. *Morgan* v. *United States,* 298 U.S. 468, 481 (1936). Of course, in adjudicatory cases subject to section 5(c), such assistants could not have performed investigative or prosecuting functions in the cases (or in factually related cases) in which they are so employed. Also, the agency heads are free to employ the hearing officer who heard a particular case as the draftsman of their final decision and otherwise to assist in its formulation. Compare generally section 4(a) of the National Labor Relations Act, as amended.

Appeals to superior agency. Nothing in section 8 is intended to cut off any rights which parties may have for appeal to or review by a superior agency. Sen. Rep. p. 23 (Sen. Doc. p. 209). The requirements of subsection 8(b) as to the form and content of decisions do not apply to decisions of a superior agency upon such appeal from or review of the agency's decision.

VIII

SECTION 9—SANCTIONS AND POWERS

Section 9 generally prohibits unauthorized action by agencies and prescribes certain rules to govern licensing proceedings. The provisions of section 9 apply to all relevant cases (other than the agencies and functions exempted by section 2(a)) regardless of the applicability of the other sections of the Act.

SECTION 9(a)—SANCTIONS

Section 9(a) provides that "in the exercise of any power or authority no sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law." The term sanction is broadly defined in section 2(f) to include the whole or part of any agency "(1) prohibition, requirement, limitation, or other condition affecting the freedom of any person; (2) withholding of relief; (3) imposition of any form of penalty or fine; (4) destruction, taking, seizure, or withholding of property; (5) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees; (6) requirement, revocation, or suspension of a license;[1] or (7) taking of other compulsory or restrictive action."

The original draft of section 9(a) limited the imposition of sanctions to those "as specified and authorized by statute." Senate Comparative Print, June 1945, p. 17 (Sen. Doc. p. 159). The change of the word "statute" to "law" was intentional so as to recognize that an agency may impose a sanction or issue a substantive rule or order if such power is authorized not only by statutes but by treaties, court decisions, commonly recognized administrative practices, or other law. See *United States* v. *MacDaniel,* 7 Pet. (32 U.S.) 1, 13-14 (1833). Both the Senate and House reports recognize that the source of authority for the imposition of a sanction or the issuance of a substantive rule or order may be either specific or general, as the case may be. Sen. Rep. p. 25, H.R. Rep. p. 40 (Sen. Doc. pp. 211, 274).

The purpose of section 9(a) is, evidently, to assure that agencies will not appropriate to themselves powers Congress has not intended them to exercise. Section 9(a) merely restates existing law. Sen. Rep. p. 43 (Sen. Doc. p. 229). Many agencies' powers are very clear; they are set forth specifically in the act creating the agency. Still other powers may be readily inferred from the framework of the act creating the agency or may be logically necessary for the conduct of the powers granted to the agency. But whether an agency's powers are express or implied, in either case they may be exercised. Particularly pertinent in this connection is the language of the Supreme Court in *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U.S. 177, 194 (1941):

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[1] The denial of an application for a renewal of a license is not a penal measure. *Federal Communications Commission* v. *WOKO,* 329 U.S. 223 (1946). It is, by definition in section 2(f), a form of agency sanction.

> A statute expressive of such large public policy as that on which the National Labor Relations Board is based must be broadly phrased and necessarily carries with it the task of administrative application. There is an area plainly covered by the language of the Act and an area no less plainly without it. *But in the nature of things Congress could not catalogue all the devices and strategems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations.* Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration.*** the relation of remedy to policy is peculiarly a matter for administrative competence. [*Italics* supplied].

SECTION 9(b)—LICENSES

Section 9(b) is composed of three sentences, each of which is mutually exclusive of the others. The first sentence applies specifically to applications for licenses, the second to suspension or revocation of licenses, and the third to renewals. Each of these will be considered separately.

Applications for licenses. The first sentence of section 9(b) provides: "In any case in which application is made for a license required by law the agency, with due regard to the rights or privileges of all the interested parties or adversely affected persons and with reasonable dispatch, shall set and complete any proceedings required to be conducted pursuant to sections 7 and 8 of this Act or other proceedings required by law and shall make its decision." The import of this sentence is that an agency shall hear and decide licensing proceedings as quickly as possible. Should the licensing proceedings be required by statute to be determined upon the record after opportunity for an agency hearing, an agency will be required to follow the provisions as to hearing and decision contained in sections 7 and 8 of the Act. As to other types of licensing proceedings, the Act does not formulate any fixed procedure (just as no fixed procedure has been formulated for adjudications other than those that are required by statute to be determined on the record after opportunity for an agency hearing).

The requirement that licensing proceedings be completed with reasonable dispatch is merely a statement of fair administrative procedure. Congress decided not to set any maximum period of time for agency consideration of applications for licenses. In the first draft of S. 7 there was a provision to the effect that an application for a license would be deemed granted unless the agency within 60 days after the application was made, rendered its decision or set the matter down for hearing. Senate Comparative Print, June 1945, p. 17 (Sen. Doc. p. 159). This provision was dropped in later drafts and replaced with the phrase "with reasonable dispatch."

The term "reasonable dispatch" is not an absolute one and cannot be described in precise terms. What is reasonable for one agency may not be reasonable for another agency. The time necessary to consider license applications for certificates of public convenience and necessity is much greater, as a rule, than that needed for issuing warehousemen's licenses under 7 U.S.C. 244. Similarly, variations in an agency's work-load, reflecting developments in an industry, may result in unavoidable temporary backlogs. Of course, where another statute prescribes a specific period of time for agency consideration of an application for a license, such specific provision will be controlling. For example, under section 355(c) of Title 21, U.S.C., an application for a license for the sale of new drugs becomes effective on the sixtieth day after the filing of the application unless the Federal Security Administrator takes appropriate action.

Suspension or revocation of licenses. The second sentence of section 9(b) provides: "Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements." This sentence requires an agency to give a licensee an opportunity to change his conduct before his license can be revoked by the agency unless the licensee's conduct is willful or the public health, interest or safety requires otherwise.

Thus, if a particular licensee should under ordinary circumstances transcend the bounds of the privilege granted to him, the agency which has granted him the license must inform him in writing of such conduct and afford him an opportunity to comply with the requirements of the agency before it can revoke, withdraw, suspend or annul his license. While the warning must be in writing, it need not take any special form.

No prior notice need be given if the licensee's conduct is willful. In such a situation the license may be revoked immediately without "another chance." Also, "another chance" need not be given where "the public health, interest, or safety requires otherwise." The latter phrase refers to a situation where immediate cancellation of a license is necessary in the public interest irrespective "of the equities or injuries to the licensee." Sen. Rep. p. 26 (Sen. Doc. p. 212). For example, in case of an accident involving aircraft, the Administrator of Civil Aeronautics may suspend the license of the pilot pending investigation. The public safety and interest require such immediate suspension. 49 U.S.C. 559.

It is clear that the provisions of this second sentence do not apply to temporary permits or temporary licenses. Sen. Rep. p. 26, H.R. Rep. p. 41 (Sen. Doc. pp. 212, 275). Such permits or licenses may be revoked without "another chance" and regardless of whether there is willfulness or whether the public health, interest, or safety is involved. And it is clear, too, that the provisions of this sentence do not apply to renewal of licenses. Renewals are treated specifically in the next sentence.

Renewal of licenses. The last sentence of section 9(b) provides: "In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency." This sentence states the best existing law and practice. Sen. Rep. p. 43 (Sen. Doc. p. 229). It is only fair where a licensee has filed his application for a renewal or a new license in ample time prior to the expiration of his license, and where the application itself is sufficient, that his license should not expire until his application shall have been determined by the agency. In such a case the licensee has done everything that is within his power to do and he should not suffer if the agency has failed, for one reason or another, to consider his application prior to the lapse of his license. Agencies, of course, may make reasonable rules requiring sufficient advance application.[2]

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[2] The Office of Alien Property of the Department of Justice has adopted such a rule with reference to renewal of licenses. 11 F.R. 177A-629.

IX

SECTION 10—JUDICIAL REVIEW

The provisions of section 10 constitute a general restatement of the principles of judicial review embodied in many statutes and judicial decisions.[1] Section 10, it must be emphasized, deals largely with principles. It not only does not supersede special statutory review proceedings, but also generally leaves the mechanics of judicial review to be governed by other statutes and by judicial rules. For example, many statutes provide that where the reviewing court finds that the taking of new evidence would be warranted, such evidence must be presented to the agency with opportunity to modify its findings. See section 9 of the Securities Act (15 U.S.C. 77i). Such provisions continue in effect. Similarly, the time within which review must be sought will be governed, as in the past, by relevant statutory provisions or by judicial application of the doctrine of laches. See Section 5(c) of the Federal Trade Commission Act (15 U.S.C. 45 (c)) and *U.S. ex rel. Arant* v. *Lane*, 249 U.S. 367 (1919). Accordingly, the general principles stated in section 10 must be carefully coordinated with existing statutory provisions and case law.[2]

Section 10 is applicable irrespective of whether the agency action for which review is sought was governed by the procedural provisions of sections 4, 5, 7 and 8. However, section 10 does not apply to those agencies and functions which are excepted by section 2(a) from all provisions of the Act except section 3. For example, the provisions of section 10 are in no way applicable to the review of agency action taken pursuant to the Housing and Rent Act of 1947.

Section 10 became effective on September 11, 1946, and is applicable from that date to the judicial review of agency action.[3] However, the Department of Justice, in briefs filed in the Supreme Court, has taken the position that section 10 does not apply to cases which were pending in the courts on September 11, 1946. While these cases were decided by the Supreme Court without any express reference to section 10, it seems fair to infer that the Court has accepted this construction. *United States* v. *Ruzicka,* 329 U.S. 287 (1946); *Board of Governors of the Federal Reserve System* v. *Agnew,* 329 U.S. 441 (1947); *Krug* v. *Santa Fe Pacific Rd. Co.,* 329 U.S. 591 (1947); *Patterson* v. *Lamb,* 329 U.S. 539 (1947).

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[1] See statements of Carl McFarland, Chairman of the Committee on Administrative Procedure of the American Bar Association, in House Hearings (1945) pp. 37-38 (Sen. Doc. pp. 83-84), and of the Attorney General in Sen. Rep. pp. 38, 43 (Sen. Doc. pp. 224, 229); 92 Cong. Rec. A2982 (Sen. Doc. pp. 406-407).

[2] Recognizing the delicacy of this problem and the obligation of Government counsel to render every assistance to the courts in this task, the Attorney General has established a committee within the Department of Justice to assist in developing a uniform approach to the problems which arise in litigation.

[3] See section 12 of the Act as to the effective dates of the various provisions of the Act.

SCOPE OF SECTION 10

Section 10 applies "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion". The intended result of the introductory clause of section 10 is to restate the existing law as to the area of reviewable agency action. House Hearings (1945) p. 38 (Sen. Doc. p. 84).

A statute may in terms preclude, or be interpreted as intended to preclude, judicial review altogether. An example of a statute expressly precluding any judicial review is the Act of March 20, 1933 (38 U.S.C. 705) providing that "All decisions rendered by the Administrator of Veterans' Affairs under the provisions [of designated statutory sections] shall be final and conclusive on all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review by mandamus or otherwise any such decision." Senate Hearings (1941) p. 1358. *Switchmen's Union of North America* v. *National Mediation Board,* 320 U.S. 297 (1943), illustrates the interpretation of a statute as intended to preclude judicial review although the statute does not expressly so provide.[4] Sen. Rep. pp. 43-44 (Sen. Doc. pp. 229-230).

The provisions of section 10 are applicable "Except so far as agency action is by law committed to agency discretion." For an example of such unreviewable agency action, see *United States* v. *George S. Bush & Co.,* 310 U.S. 371 (1940) (action by the President under section 336(c) of the Tariff Act "if in his judgment" such action is necessary). More broadly, there are many statutory provisions which merely authorize agencies to make loans; under such statutes, the agencies' discretion is usually so complete that the refusal to make a loan is not reviewable under section 10 or any other statute. Also, the refusal by the National Labor Relations Board to issue a complaint is, as heretofore, an exercise of discretion unreviewable by the courts. See *Jacobsen* v. *National Labor Relations Board,* 120 F. 2d 96 (C.C.A. 3, 1941), and Senate Comparative Print of June 1945, p. 19, para. (3) (Sen. Doc. p. 38). For the same reason, the denial of a petition pursuant to section 4(d) of this Act for the issuance, amendment or repeal of a rule is not subject to judicial review. Sen. Rep. p. 44 (Sen. Doc. p. 230).

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[4] As S. 7 was introduced in the Senate in January 1945, the introductory phrase of section 10 read "Except (1) so far as statutes *expressly* preclude judicial review". [Italics supplied]. As reported in its present form by the Senate Committee on the Judiciary, the word "expressly" was omitted. This omission provides strong support for the conclusion that the courts remain free to deduce from the statutory context of particular agency action that the Congress intended to preclude judicial review of such action.

In addition, the introductory clause of section 10 provides a most important principle of construction for reconciling the provisions of the section with other statutory provisions relating to judicial review. All of the provisions of section 10 are qualified by the introductory clause, "*Except so far as* (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion" [Emphasis supplied]. The emphasized phrase does not mean that every provision of section 10 is applicable except *where* statutes preclude judicial review altogether. Instead, it reads "*Except so far as* (1) statutes preclude judicial review", with the clear result that some other statute, while not precluding review altogether, will have the effect of preventing the application of some of the provisions of section 10. The net effect, clearly intended by the Congress, is to provide for a dovetailing of the general provisions of the Administrative Procedure Act with the particular statutory provisions which the Congress has moulded for special situations.[5] Thus, a civil service employee of the Federal Government who alleges unlawful removal from office, can obtain judicial review only of the question of whether the procedures of the Civil Service Act were followed. *Levine* v. *Farley,* 107 F. 2d 186 (App. D.C., 1939), certiorari denied, 308 U.S. 622. In such a case, the provisions of section 10(e), for example, relating to substantial evidence and to review of abuses of discretion, will not apply.

SECTION 10(a)—RIGHT OF REVIEW

Section 10(a) provides that "Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof." This statement of the persons entitled to judicial review has occasioned considerable comment because of the use of the phrase "any person suffering legal wrong". This phrase was used as one of limitation and not for the purpose of making judicial review available to anyone adversely affected by governmental action.[6] The delicate problem of the draftsmen was to identify in general terms the persons who are entitled to judicial review. As so used, "legal wrong" means such wrong as particular statutes and the courts have recognized as constituting ground for judicial review. "Adversely affected or aggrieved" has frequently been used in statutes to designate the persons who can obtain judicial review of administrative action.[7] The determination of who is "adversely affected or aggrieved * * * within the meaning of any relevant statute" has "been marked out largely by the gradual judicial process of inclusion and exclusion, aided at times by the courts' judgment as to the probable legislative intent derived from the spirit of the statutory scheme". Final Report, p. 83; see also pp. 84-85. The Attorney General advised the Senate Committee on the Judiciary of his understanding that section 10(a) was a restatement of existing law. More specifically he indicated his understanding that section 10(a) preserved the rules developed by the courts in such cases as *Alabama Power Co.* v. *Ickes*, 302 U.S. 464 (1938); *Massachusetts* v. *Mellon*, 262 U.S. 447 (1923); *The Chicago Junction Case*, 264 U.S. 258 (1924); *Sprunt & Son* v. *U. S.*, 281 U.S. 249 (1930); *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113 (1940); and *Federal Communications Commission* v. *Sanders Brs. Radio Station*, 309 U.S. 470 (1940). Sen. Rep. p. 44 (Sen. Doc. p. 230). This construction of section 10(a) was not questioned or contradicted in the legislative history.[8] Also implied is the continuing role of the courts in determining, in the context of constitutional requirements and the particular statutory pattern, who is entitled to judicial review.

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[5] This conclusion is supported by the following statement in the Senate Comparative Print, p. 18 (Sen. Doc. p. 36): "The introductory exceptions state the two present general or basic situations in which judicial review is precluded—where (1) the matter is discretionary or (2) statutes withhold *judicial powers*." [Italics supplied].

SECTION 10(b)—FORM AND VENUE OF ACTION

Section 10(b) provides that "The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law."

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[6] Compare original provision of S. 7 as introduced in the Senate: "Any person adversely affected by any agency action shall be entitled to judicial review thereof in accordance with this section."

[7] See section 9 of the Securities Act (15 U.S.C. 77i), "any person aggrieved"; section 402(b)(2) of the Communications Act (46 U.S.C. 402), "person aggrieved or whose interests are adversely affected"; section 1006 of the Civil Aeronautics Act (49 U.S.C. 646), "person disclosing a substantial interest in such order".

[8] See *American Stevedores, Inc.* v. *Porello*, 330 U.S. 446 (1947).

Form of action. Many regulatory statutes provide for judicial review of agency action by requiring the complaining party to file with a circuit court of appeals (or with a district court) a written petition praying that the agency action be modified or set aside; thereafter, the agency files with the reviewing court a transcript of the record.[9] Under such statutory provisions, the filing of a petition to modify or set aside agency action will continue to be the required form of proceeding for judicial review. Similarly, where agency action is now reviewable pursuant to the Urgent Deficiencies Act of 1913 (28 U.S.C. 47), the form of proceeding will consist of suits to enjoin[10] in accordance with the provisions of that Act.

In the absence of any special statutory review proceedings, other forms of action, as heretofore found by the courts to be appropriate in particular situations, will be used. Thus, habeas corpus proceedings should be used to obtain review of exclusion and deportation orders. *U.S. ex rel. Vajtauer* v. *Commissioner of Immigration,* 273 U.S. 103 (1927). Likewise, an order of the Postmaster General suspending second-class mailing privileges may, as before, be tested by a suit to enjoin such action. *Hannegan* v. *Esquire, Inc.,* 327 U.S. 146 (1946). In brief, where agency action is reviewable, but the Congress has not specified the form of review, the courts will continue to select the appropriate form of action.

Also, where a special statutory review proceeding is not legally adequate, the form of proceeding for judicial review will be "any applicable form of legal action * * * in any court of competent jurisdiction". The Act does not purport to define "inadequate", and thus leaves to the courts the determination of whether a particular statutory review proceeding is legally adequate. As stated by the Attorney General: "if the procedure is inadequate (*i.e., where under existing law a court would regard the special statutory procedure as inadequate and would grant another form of relief*), then any applicable procedure, such as prohibitory or mandatory injunction, declaratory judgment, or habeas corpus, is available". [Emphasis supplied]. Sen. Rep. p. 44 (Sen. Doc. p. 230). Thus, the Act does not provide any new definition of "adequate", but rather assumes that the courts will determine the adequacy of statutory review procedures by the legal standards which the courts themselves have already developed. See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48 (1938).

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[9] See section 5(c) of the Federal Trade Commission Act (15 U.S.C. 45(c)); section 9 of the Securities Act (15 U.S.C. 77i); and section 701 of the Federal Food, Drug and Cosmetic Act (21 U.S.C. 371(f)).

[10] "The expression 'special statutory review' means not only special review proceedings wholly created by statute, but so-called common-law forms referred to and adopted by other statutes as the appropriate mode of review in given cases." Sen. Rep. p. 26; H.R. Rep. p. 42 (Sen. Doc. pp. 212, 276).

Venue. Section 10(b) does not purport to change existing venue requirements for judicial review. In fact, it specifically refers to review "in any court specified by statute", or "in any court of competent jurisdiction". In the report of the House Committee, it is stated that "The section does not alter venue provisions under existing law, whether in connection with specially provided statutory review or the so-called nonstatutory or common-law action variety." H.R. Rep. p. 42 (Sen. Doc. p. 276). See also Representative Walter's statement to the House, 92 Cong. Rec. 5654 (Sen. Doc. p. 369). Thus, for example, station and construction licensing orders issued by the Federal Communications Commission remain reviewable only by the Court of Appeals for the District of Columbia (47 U.S.C. 402(b)). More generally, statutes specifically providing for judicial review in a circuit court of appeals or a district court often designate the venue by relation to the matters involved, such as "any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein [the person aggrieved] resides or transacts business, or in the Court of Appeals of the District of Columbia". (Section 10(f) of the National Labor Relations Act).[11] Such provisions are continued in effect. So also are the general statutory provisions concerning venue, such as 28 U.S.C. 112 that "no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant". For the application of this section to suits against

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[11] For other examples, see 28 U.S.C. 43 for venue of suits to enjoin orders of the Interstate Commerce Commission, section 1006(b) of the Civil Aeronautics Act (49 U.S.C. 646(b)), and section 21 of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 921).

Government agencies, see *Kentucky Natural Gas Corp.* v. *Public Service Comm.*, 28 F. Supp. 509, affirmed 119 F. 2d 417 (C.C.A. 6, 1941); and *Scientific Mfg. Co.* v. *Walker*, 40 F. Supp. 465 (M.D. Pa. 1941).

Review in enforcement proceedings. Section 10(b) also provides that "Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law". In the Committee reports it is stated that "The provision respecting 'prior, adequate, and exclusive * * * review' in the second sentence is operative only where statutes, *either expressly or as they are interpreted*, require parties to resort to some special statutory form of judicial review which is prior in time and adequate to the case." [Emphasis supplied]. Sen. Rep. p. 27; H.R. Rep. p. 42 (Sen. Doc. pp. 213, 276). So interpreted, this provision restates existing law.[12] Thus, a statute may either expressly provide for an exclusive method of judicial review which precludes challenge of agency action in enforcement proceedings,[13] or a court may conclude from the statutory context that such was the legislative intention. *United States* v. *Ruzicka*, 329 U.S. 287 (1946), interpreting the Agricultural Marketing Agreement Act of 1937, is an excellent example of the latter situation.[14] Similarly, section 10(b) leaves intact the doctrine of primary jurisdiction developed by the courts in cases involving the reasonableness of the charges of carriers and public utilities. See *Ambassador, Inc.* v. *United States*, 325 U.S. 317 (1945). It also leaves intact the requirements of the doctrine of exhaustion of administrative remedies. In many situations, however, an appropriate method of attacking the validity of agency action is to set up the alleged invalidity as a defense in a civil or criminal enforcement proceeding.

The adequacy of an exclusive method for judicial review would appear to be governed by the same considerations as the courts would apply in determining the adequacy or inadequacy of a statutory review proceeding for the purposes of the first sentence of section 10(b). Thus, the use of the word "prior" in the last sentence of section 10(b) does not mean that the validity of agency action may always be challenged collaterally by way of defense in enforcement proceedings whenever the method of review specified by the Congress does not result in a judicial determination as to the validity of such action prior to the commencement of enforcement proceedings. As indicated above, the Congress intended section 10 as a whole to be integrated and reconciled with existing statutory provisions for judicial review. Specifically, the general principle stated in the last sentence of section 10(b) was not regarded by the Congress as an innovation. Rather, it was said that "The second sentence states the present rule as to enforcement proceedings." Senate Comparative Print, p. 18 (Sen. Doc. p. 37). And further: "These provisions summarize the situation as it is now generally understood. The section [10(b)] does not disturb special proceedings which Congress has provided, nor does it disturb the venue arrangements under existing law." Representative Walter, 92 Cong. Rec. 5654 (Sen. Doc. p. 369).

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[12] The Senate Committee changed the last phrase of the provision from "provided by statute" to "provided by law". See also Senate Comparative Print, June 1945, p. 18 (Sen. Doc. p. 37), stating that "The second sentence states the present rule as to enforcement proceedings." See Representative Walter's statement to the House, 92 Cong. Rec. 5654 (Sen. Doc. p. 369): "These provisions summarize the situation as it is now generally understood. The section does not disturb special proceedings which Congress has provided, nor does it disturb the venue arrangements under existing law."

[13] See section 204(d) of the Emergency Price Control Act of 1942.

[14] See also *Walling* v. *Cohen*, 48 F. Supp. 859 (E.D. Pa. 1943), affirmed 140 F. 2d 453 (C.C.A. 3, 1944) under the Fair Labor Standards Act, and *Piuma* v. *United States*, 126 F. 2d 601 (C.C.A. 9, 1942), certiorari denied, 317 U.S. 637, under the Federal Trade Commission Act.

There are many situations in which the invalidity of agency action may be set up as a defense in enforcement proceedings. On the other hand, there are special statutory arrangements under which the Congress has provided for immediate and continuous enforcement while the exclusive route to judicial review is by first exhausting an administrative procedure; in such an agency proceeding, the agency and the parties make a record with a view toward (a) reconsideration by the agency itself, and (b) providing an adequate factual record as the basis for judicial review by a specified court. See *United States* v. *Ruzicka, supra.* There is nothing to indicate that the Congress intended to repeal by implication such special statutory arrangements for compliance pending orderly judicial review, or to preclude itself from making similar arrangements in the future. Similarly, it is believed that the courts are left free to apply the primary jurisdiction doctrine in enforcement proceedings so as to require issues relating to the alleged unreasonableness of filed tariffs to be first presented to the appropriate administrative agency rather than to an enforcement court. See *Ambassador, Inc.* v. *United States, supra.* In brief, the courts must determine in each case whether the Congress, by establishing a special review procedure, intended to preclude or to permit judicial review of agency action in enforcement proceedings. And, the extent to which the "opportunity" for judicial review prior to the enforcement proceedings has been waived or disregarded by the defendant in those proceedings must also be considered.

SECTION 10(c)—REVIEWABLE ACTS

The provisions of this subsection defining agency action subject to judicial review are said to "involve no departure from the usual and well understood rules of procedure in this field". Representative Walter, 92 Cong. Rec. 5654 (Sen. Doc. p. 369); Sen. Rep. p. 44 (Sen. Doc. p. 230).

First, it is provided that "Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review." Many statutes specifically provide for judicial review of particular agency action, and such action will continue to be reviewable. The second category, "and every final agency action for which there is no other adequate remedy in any court", must be interpreted in the light of other statutory and case law. To begin with, of course, it does not make reviewable agency action as to which "(1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion." Furthermore, this provision does not provide additional judicial remedies in situations where the Congress has provided special and adequate review procedures. See the first clause of section 10(b). Thus, the Customs Court and the Court of Customs and Patent Appeals retain their present exclusive jurisdictions.[15]

"Agency action", as used in section 10, is defined in section 2(g) as including "the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." Sen. Rep. p. 11; H.R. Rep. p. 21 (Sen. Doc. pp. 197, 255). While "final", as used to designate reviewable agency action, is not defined in the Act, its meaning may be gleaned from the second and third sentences of section 10(c). Moreover, many regulatory statutes, either expressly or as they are interpreted, have provided for review of (and only of) "final" agency orders, with the result that the judicial construction of such provisions will carry over to the interpretation of "final" as used in section 10(b). See *Rochester Telephone Corp.* v. *United States,* 307 U.S. 125 (1939).

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[15] In the Attorney General's memorandum to the Senate Committee, he stated that "'Courts' includes the Tax Court, Court of Customs and Patent Appeals, the Court of Claims, and similar courts. This act does not apply to their procedure nor affect the requirement of resort thereto." Sen. Rep. p. 38 (Sen. Doc. p. 224).

Since "agency action" is defined to include "rule", the question arises as to whether the phrase, "final agency action for which there is no other adequate remedy in any court", provides for direct judicial review of all rules. Many statutes which give rule making powers (particularly rules of general applicability) to agencies make no provision for judicial review of such rules. The validity of such rules has generally been open to challenge in proceedings for their enforcement. In addition, it has been suggested that in appropriate circumstances, review could be obtained in proceedings under the Declaratory Judgment Act (28 U.S.C. 400). It is clear from the legislative history that section 10(c) was not intended to provide for judicial review in the abstract of all rules. Representative Walter stated to the House that "The provisions of this [sub] section are technical but involve no departure from the usual and well understood rules of procedure in this field." 92 Cong. Rec. 5654 (Sen. Doc. p. 369). Also, during the Senate Hearings in 1941, the subect of judicial review of rules was thoroughly discussed. Two of the bills then pending provided for direct judicial review of rules by declaratory judgment proceedings. (See S. 674 and S. 918). The inclusion of such a provision was strongly advocated by a minority of the Attorney General's Committee on Administrative Procedure who stated that their purpose was—

> to adapt declaratory judgment procedure to this special subject. The minority feels that it is unnecessary and unwise to provide for court review (except where otherwise required by particular statutes) of rules in the abstract. On the other hand, such review upon the application of the rule to a particular person, or upon accepted principles of declaratory judgment, should be expressly recognized. In his letter accompanying the veto of the Logan-Walter bill, the Attorney General stated that—
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> > under the Declaratory Judgments Act of 1934, any person may now obtain a judgment as to the validity of such administrative rules, if he can show such an interest and present injury therefrom as to constitute a "case or controversy."
>
> However, the Declaratory Judgments Act does not altogether fit the subject and needs some limitation (not, it may be noted, extension) to care for the determination of fact issues, since under the Declaratory Judgments Act juries determine the facts under instructions from the presiding judge. In adapting declaratory judgment procedure to this field, some special provision must be made for the determination of facts, for otherwise the facts in the first instance would be determined through judicial rather than administrative process. (Senate Hearings (1941) pp. 1344, 1386.)

In other words, even the proponents of detailed provisions for judicial review of rules did not intend to prescribe an abstract form of review going far beyond the limitations of the Declaratory Judgment Act. Thus, it is fair to conclude that the general statement in the first sentence of section 10(c) was not intended to achieve such a result.

The second sentence of section 10(c) provides that "Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action." This language was designed "to negative any intention to make reviewable merely preliminary or procedural orders where there is a subsequent and adequate remedy at law available, as is presently the rule." Senate Comparative Print, June 1945, p. 19[16] (Sen. Doc. p. 37). For example, intermediate orders such as orders setting matters for hearing are not reviewable either directly (*Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U.S. 375 (1938)) or collaterally, as by suits for injunction (*Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938)) or declaratory judgment (*Macauley* v. *Waterman S. S. Co.*, 327 U.S. 540 (1946); *Federal Power Commission* v. *Arkansas Power & Light Co., per curiam,* 330 U. S. 802 (1947)). The provision for review of such questions as a part of the review of final agency action restates existing practice. See section 10(e) (4).

Section 10(c) further provides that "Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority." This provision, together with the preceding sentence of the subsection, embodies the doctrine of exhaustion of administrative remedies. H.R. Rep. p. 55, fn. 21 (Sen. Doc. p. 289). Agency action which is finally operative and decisive is reviewable. On the other hand, "Action which is automatically stayable on further proceedings invoked by a party is not final." H.R. Rep. p. 43 (Sen. Doc. p. 277).

It is specifically provided that agency action otherwise final is final for the purposes of the subsection notwithstanding a party's failure to apply for any form of agency reconsideration (reopening, rehearing, etc.), unless a statute expressly requires an application for such reconsideration as a prerequisite to judicial review. Under statutes such as the Federal Power Act (16 U.S.C. 791, 825l) and the Natural Gas Act (15 U.S.C. 717r) which expressly require that such reconsideration be sought, the filing of an application for reconsideration will continue to be a condition precedent to judicial review. In addition, it would seem that under the common statutory provision that no objection to agency action not urged before the agency shall be considered by the courts, an application for agency reconsideration remains a prerequisite to obtaining judicial review of such an objection. See 15 U.S.C. 77(i) and 49 U.S.C. 646(e). However, under a statute which merely confers upon parties the right to apply for rehearing, it is now clear that an application for such reconsideration need not precede judicial review. See generally, as to the effect of agency rules in this field, *Levers* v. *Anderson*, 326 U.S. 219 (1945).

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[16] See Final Report, pp. 85-86.

The last clause of section 10(c) relates to two situations. First, pursuant to section 8(a), an agency may permit its hearing examiners to make initial decisions which will become the agency's final decisions in the absence of an appeal to or review by the agency. The last clause of section 10(c) permits an agency to require *by rule* that in such cases parties who are dissatisfied with the "initial" decisions of hearing officers must appeal to the agency before seeking judicial review, but only if the agency further provides that the hearing officers' decisions shall be inoperative pending such administrative appeals. Thus, an agency with licensing powers may by rule require a party to appeal to it from an initial decision of a hearing officer only if, for example, the license suspension or revocation determined upon by the hearing officer is held in abeyance pending the agency's action on the appeal. Sen. Rep. p. 27; H.R. Rep. pp. 43, 55, fn. 21 (Sen. Doc. pp. 213, 277, 289).

The second and similar application of the last clause of section 10(c) relates to appeals from agency decisions to a superior agency authority. For example, under some circumstances, it would seem that a bureau or other subdivision within an agency may itself be the agency with respect to a particular function. In such a situation, it may be desired to require appeal from the bureau's decision to the department head or other "superior agency authority" as a prerequisite to judicial review. Under section 10(c), such a requirement may be imposed, but only, as in the case of required appeals from hearing officers' initial decisions, if the agency's decision is inoperative pending such appeal. Sen. Rep. p. 27; H.R. Rep. p. 43 (Sen. Doc. pp. 213, 277).

The requirement that agency action be inoperative pending required appeals to the agency or to superior agency authority does not require the agency to take positive action for the benefit of an applicant. It was not intended to require the issuance of licenses or the payment of benefits in any case where an agency requires that the denial of licenses or benefits be appealed to it or to superior agency authority as a prerequisite to judicial review.[17]

SECTION 10(d)—INTERIM RELIEF

Section 10(d) provides that "Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings." The first sentence of the subsection is a restatement of existing law.

The second sentence of section 10(d) confers upon every "reviewing court" discretionary authority to stay agency action pending judicial review "to the extent necessary to prevent irreparable injury." The function of such a power is, as heretofore, to make judicial review effective. Sen. Rep. p. 27; H.R. Rep. p. 43 (Sen. Doc. pp. 213, 277). *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission,* 316 U.S. 4 (1942). The subsection does not permit a court to order the grant of an initial license pending judicial review of an agency's denial of such a license. Sen. Rep. p. 27; H.R. Rep. p. 43 (Sen. Doc. pp. 213, 277). By the same logic, the subsection does not give to reviewing courts the power to order interim payment of grants or benefits the denial of which is the subject of review.

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[17] This conclusion is corollary to the following statement made with respect to section 10(d): "This section permits either agencies or courts, if the proper showing be made, to maintain the status quo. While it would not permit a court to grant an initial license, it provides intermediate judicial relief for every other situation in order to make judicial review effective." Sen. Rep. p. 27, H.R. Rep. p. 43 (Sen. Doc. pp. 213, 277).

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The stay power conferred upon reviewing courts is to be exercised only "to the extent necessary to prevent irreparable injury." In other words, irreparable injury, the historic condition of equity jurisdiction, is the indispensable condition to the exercise of the power conferred by section 10(d) upon reviewing courts. Sen. Rep. p. 44 (Sen. Doc. p. 230). Mere maintenance of the status quo for the convenience of parties pending judicial review of agency action will not be adequate ground for the exercise of this stay power.[18]

This power to stay agency action is an equitable power, to be exercised "upon such conditions as may be required." Section 10(d) does not require the issuance of stay orders automatically upon a showing of irreparable damage. As in the past, reviewing courts may "balance the equities" in determining whether to postpone the effective date of agency action. Thus, "In determining whether agency action should be postponed, the court should take into account that persons other than parties may be adversely affected by such postponement and in such cases the party seeking postponement may be required to furnish security to protect such other persons from loss resulting from postponement." H.R. Rep. p. 43 (Sen. Doc. p. 277). More broadly, it is clear that a reviewing court in exercising this power may do so under such conditions as the equities of the situation may require.

The "reviewing court" in which section 10(d) vests the power to stay agency action is the court, and only that court, which has obtained jurisdiction to review the final agency action in accordance with subsections (b) and (c) and the applicable provisions of particular statutes.[19] Section 10(d) confers no power upon a court in advance of the submission to it of final agency action for review on the merits. See *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U.S. 375, 383 (1938). This is the only logical conclusion to be drawn from the employment of the phrase "reviewing court", rather than "any court." Any other construction would twist section 10(d) into a general grant of power to the Federal courts to review all kinds of questions presented by preliminary and intermediate agency action. The specific provisions of section 10(c) defining reviewable action negate such a result. The legislative history of section 10(d) is equally persuasive; as S. 7 was introduced in the Senate, section 10(d) provided for its exercise "to the extent necessary to * * * *afford an opportunity for judicial review of any question of law* or prevent irreparable injury." The italicized language was dropped by the Senate Committee, which reported the subsection in its present form. Finally, section 10(d) provides that the reviewing court may "issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights *pending conclusion of the review proceedings."* [Emphasis supplied]. The italicized language is conclusive that the stay power conferred by the subsection is only ancillary to review proceedings—proceedings in which the court is reviewing final agency action within the meaning of section 10(c).

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[18] This distinction and the Congressional intent with respect to it are clearly illustrated by the fact that when S. 7 was introduced in the Senate, it read: "to the extent necessary to preserve status or rights, afford an opportunity for judicial review of any question of law *or* prevent irreparable injury." [Emphasis supplied]

[19] This was the holding in *Avon Dairy Company* v. *Eisaman*, 69 F. Supp. 500 (N. D. Ohio, 1946).

Section 10(d) prescribes no procedure for the exercise of the power which it confers upon reviewing courts to postpone the effective date of agency action. Section 381 of Title 28, U.S. Code,[20] contains general procedural provisions governing the issuance of preliminary injunctions and restraining orders. Since these procedural provisions are in no way inconsistent with section 10(d), they appear to be applicable to the exercise of the power conferred by that subsection. Similarly, the provisions of the Urgent Deficiencies Act (28 U.S.C. 47), governing the procedure for the issuance of interlocutory injunctions and temporary stays, remain applicable in proceedings for judicial review under that Act.

SECTION 10(e)—SCOPE OF REVIEW

The scope of judicial review is defined in section 10(e) as follows:

> So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

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[20] See also Rule 65 of the Federal Rules of Civil Procedure.

This restates the present law as to the scope of judicial review. Senate Comparative Print, June 1945, p. 20[21] (Sen. Doc. p. 39); House Hearings (1945) pp. 37-38 (Sen. Doc. pp. 83-84); Sen. Rep. pp. 38, 43, 44 (Sen. Doc. pp. 224, 229, 230).

Clause (A) authorizing a reviewing court to "compel agency action unlawfully withheld or unreasonably delayed", appears to be a particularized restatement of existing judicial practice under section 262 of the Judicial Code (28 U.S.C. 377). *Safeway Stores, Inc.* v. *Brown,* 138 F. 2d 278 (E.C.A., 1943), certiorari denied, 320 U.S. 797. The power thus stated is vested in "the reviewing court", which, in this context, would seem to be the court which has or would have jurisdiction to review the final agency action. See *Roche* v. *Evaporated Milk Ass'n.,* 319 U.S. 21, 25 (1943). Orders in the nature of a writ of mandamus have been employed to compel an administrative agency to act, *Safeway Stores, Inc.* v. *Brown, supra,* or to assume jurisdiction, *Interstate Commerce Commission* v. *United States ex rel. Humboldt Steamship Co.,* 224 U.S. 474 (1912), or to compel an agency or officer to perform a ministerial or non-discretionary act. Clause (A) of section 10(e) was apparently intended to codify these judicial functions.

Obviously, the clause does not purport to empower a court to substitute its discretion for that of an administrative agency and thus exercise administrative duties. In fact, with respect to constitutional courts, it could not do so. *Keller* v. *Potomac Electric Power Co.,* 261 U.S. 428 (1923); *Postum Cereal Co.* v. *California Fig Nut Co.,* 272 U.S. 693 (1927); *Federal Radio Commission* v. *General Electric Co.,* 281 U.S. 464 (1930). However, as in *Safeway Stores* v. *Brown, supra,* a court may require an agency to take action upon a matter, without directing how it shall act.

The numbered clauses of section 10(e)(B) restate the scope of the judicial function in reviewing final agency action. Sen. Rep. p. 44 (Sen. Doc. p. 230); Senate Hearings (1941) pp. 1150, 1351, 1400, 1437. Courts having jurisdiction have always exercised the power in appropriate cases to set aside agency action which they found to be "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law."

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[21] "Subsection (e), therefore, seeks merely to restate the several categories of law subject to judicial review."

Clause (5) directs reviewing courts to "hold unlawful and set aside agency action, findings, and conclusions found to be * * * unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute." This is a general codification of the substantial evidence rule which, either by statute or judicial rule, has long been applied to the review of Federal administrative action. *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U.S. 197 (1938); *National Labor Relations Board* v. *Remington Rand,* 94 F. 2d 862 (C.C.A. 2, 1938). It will be noted that this codified substantial evidence rule is made applicable not only to cases governed by sections 7 and 8, but also to those types of cases in which statutes provide for agency hearings, but which are exempted from sections 7 and 8 by the introductory clause of section 5.

As to clause (6), the legislative history has resulted in misunderstanding. As S. 7 was introduced in the Senate, clause (6) was followed by a provision that "The relevant facts shall be tried and determined de novo by the original court of review in all cases in which adjudications are not required by statute to be made upon agency hearing." When S. 7 was reported by the Senate Committee, the quoted provision was omitted. Notwithstanding, the subsequent legislative history contains repeated statements to the effect that clause (6) embodies the "established rule * * * [which requires a judicial] trial de novo to establish the relevant facts as to the applicability of any rule and as to the propriety of adjudications where there is no statutory administrative hearing." Senate Comparative Print, June 1945, p. 20 (Sen. Doc. pp. 39-40); H.R. Rep. p. 45 (Sen. Doc. p. 279).

To the contrary, the language of clause (6), "to the extent that the facts are subject to trial de novo by the reviewing court", obviously refers only to those existing situations in which judicial review has consisted of a trial de novo. For example, reparation orders under the Interstate Commerce Act and the Packers and Stockyards Act have only prima facie weight and are thus reviewable *de novo.* In addition, there is no "established rule" requiring a judicial trial *de novo* wherever statutes fail to require an agency hearing. Thus, in deportation (8 U.S.C. 155) and mail fraud (39 U.S.C. 259) cases, hearings are held as a matter of due process although the statutes do not require agency hearings. In both types of cases, the judicial review of agency action has consisted of a review of the record made in the agency proceeding to determine whether the agency action is supported by evidence.[22] Accordingly, since clause (6) of section 10(e) prescribes a judicial trial *de novo* only in situations where other statutes or the courts have prescribed such review, it is clear that deportation and mail fraud orders will continue to be reviewable on the record made in the agency hearing, even though such hearing is not required by statute. Also, in *National Broadcasting Company* v. *United States*, 319 U.S. 190, 227 (1943), it was held that a trial *de novo* was not appropriate where, prior to the issuance of general regulations, the agency conducted a formal hearing although not required by statute to do so.

Finally, section 10(e) provides that "In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error." This appears to restate existing law. Specifically, the phrase "whole record" was not intended to require reviewing courts to weigh the evidence and make independent findings of fact; rather, it means that in determining whether agency action is supported by substantial evidence, the reviewing court should consider all of the evidence and not merely the evidence favoring one side. Senate Hearings (1941) p. 1359.

The last phrase of section 10(e) sums up in succinct fashion the "harmless error" rule applied by the courts in the review of lower court decisions as well as of administrative bodies, namely, that errors which have no substantial bearing on the ultimate rights of the parties will be disregarded. *Market Street Ry.* v. *Comm'n.*, 324 U.S. 548, 561-2 (1945).

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[22] *Vajtauer* v. *Commissioner*, 273 U.S. 103, 106 (1927) and *Bridges* v. *Wixon*, 326 U.S. 135, 149 (1945) (deportation). In deportation proceedings, a judicial trial *de novo* may be had on the issue of citizenship. *Kessler* v. *Strecker*, 307 U.S. 22, 35 (1939). See *Farley* v. *Simmons*, 99 F. 2d 343, 347 (App. D.C. 1938) certiorari denied, 305 U.S. 651, for review of mail fraud orders; also Senate Hearings, (1941) p. 59.

APPENDIX A

[PUBLIC LAW 404—79TH CONGRESS]
[CHAPTER 324—2D SESSION]

[S. 7]

AN ACT

To improve the administration of justice by prescribing fair administrative procedure.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE

SECTION 1. This Act may be cited as the "Administrative Procedure Act".

DEFINITIONS

SEC. 2. As used in this Act—

(a) AGENCY.—"Agency" means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia. Nothing in this Act shall be construed to repeal delegations of authority as provided by law. Except as to the requirements of section 3, there shall be excluded from the operation of this Act (1) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them, (2) courts martial and military commissions, (3) military or naval authority exercised in the field in time of war or in occupied territory, or (4) functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947, and the functions conferred by the following statutes: Selective Training and Service Act of 1940; Contract Settlement Act of 1944; Surplus Property Act of 1944.

(b) PERSON AND PARTY.—"Person" includes individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies. "Party" includes any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any

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agency proceeding; but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes.

(c) RULE AND RULE MAKING.—"Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or perscription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

(d) ORDER AND ADJUDICATION.—"Order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. "Adjudication" means agency process for the formulation of an order.

(e) LICENSE AND LICENSING.—"License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission. "Licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation amendment, modification, or conditioning of a license.

(f) SANCTION AND RELIEF.—"Sanction" includes the whole or part of any agency (1) prohibition, requirement, limitation, or other condition affecting the freedom of any person; (2) withholding of relief; (3) imposition of any form of penalty or fine; (4) destruction, taking, seizure, or withholding of property; (5) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees; (6) requirement, revocation, or suspension of a license; or (7) taking of other compulsory or restrictive action. "Relief" includes the whole or part of any agency (1) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy; (2) recognition of any claim, right, immunity, privilege, exemption, or exception; or (3) taking of any other action upon the application or petition of, and beneficial to, any person.

(g) AGENCY PROCEEDING AND ACTION.—"Agency proceeding" means any agency process as defined in subsections (c), (d), and

(e) of this section. "Agency action" includes the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

PUBLIC INFORMATION

SEC. 3. Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency—

(a) RULES.—Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

(b) OPINIONS AND ORDERS.—Every agency shall publish or, in accordance with published rule, make available to public inspection all final opinions or orders in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents) and all rules.

(c) PUBLIC RECORDS.—Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found.

RULE MAKING

SEC. 4. Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—

(a) NOTICE.—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) PROCEDURES.—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.

(c) EFFECTIVE DATES.—The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

(d) PETITIONS.—Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule.

ADJUDICATION

SEC. 5. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives—

(a) NOTICE.—Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(b) PROCEDURE.—The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 7 and 8.

(c) SEPARATION OF FUNCTIONS.—The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency.

(d) DECLARATORY ORDERS.—The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty.

ANCILLARY MATTERS

SEC. 6. Except as otherwise provided in this Act—

(a) APPEARANCE.—Any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. Every party shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any agency proceeding. So far as the orderly conduct of public business permits, any interested person may appear before any agency or its responsible officers or employees for the presentation, adjustment, or determination of any issue, request, or controversy in any proceeding (interlocutory, summary, or otherwise) or in connection with any agency function. Every agency shall proceed with reasonable dispatch to conclude any matter presented to it except that due regard shall be had for the convenience and necessity of the parties or their representatives. Nothing herein shall be construed either to grant or to deny to any person who is not a lawyer the right to appear for or represent others before any agency or in any agency proceeding.

(b) INVESTIGATIONS.—No process, requirement of a report, inspection, or other investigative act or demand shall be issued, made, or enforced in any manner or for any purpose except as authorized by law. Every person compelled to submit data or evidence shall be entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

(c) SUBPENAS.—Agency subpenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought. Upon contest the court shall sustain any such subpena or similar process or demand to the extent that it is found to be in accordance with law and, in any proceeding for enforcement, shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

(d) DENIALS.—Prompt notice shall be given of the denial in whole or in part of any written application, petition, or other request of any interested person made in connection with any agency proceeding. Except in affirming a prior denial or where the denial is self-explanatory, such notice shall be accompanied by a simple statement of procedural or other grounds.

HEARINGS

SEC. 7. In hearings which section 4 or 5 requires to be conducted pursuant to this section—

(a) PRESIDING OFFICERS.—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case.

(b) HEARING POWERS.—Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act.

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(c) EVIDENCE.—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrevelant immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(d) RECORD.—The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

DECISIONS

SEC. 8. In cases in which a hearing is required to be conducted in conformity with section 7—

(a) ACTION BY SUBORDINATES.—In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subect to subsection (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to section 7) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires.

(b) SUBMITTALS AND DECISIONS.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

SANCTIONS AND POWERS

SEC. 9. In the exercise of any power or authority—

(a) IN GENERAL.—No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law.

(b) LICENSES.—In any case in which application is made for a license required by law the agency, with due regard to the rights or privileges of all the interested parties or adversely affected persons and with reasonable dispatch, shall set and complete any proceedings required to be conducted pursuant to sections 7 and 8 of this Act or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements. In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency.

JUDICIAL REVIEW

SEC. 10. Except so far as (1) statutes precude judicial review or (2) agency action is by law committed to agency discretion—

(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) INTERIM RELIEF.—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effectice date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

EXAMINERS

SEC. 11. Subject to the civil-service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 7 and 8, who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission (hereinafter called the Commission) after opportunity for hearing and upon the record thereof. Examiners shall receive compensation prescribed by the Commission independently of agency recommendations or ratings and in accordance with the Classification Act of 1923, as amended, except that the provisions of paragraphs (2) and (3) of subsection (b) of section 7 of said Act, as amended, and the provisions of section 9 of said Act, as amended, shall not be applicable. Agencies occasionally or temporarily insufficiently staffed may utilize examiners selected by the Commission from and with the consent of other agencies. For the purposes of this section, the Commission is authorized to make investigations, require reports by agencies, issue reports, including an annual report to the Congress, promulgate rules, appoint such advisory committees as may be deemed necessary, recommend legislation, subpena witnesses or records, and pay witness fees as established for the United States courts.

CONSTRUCTION AND EFFECT

SEC. 12. Nothing in this Act shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons. If any provision of this Act or the application thereof is held invalid, the remainder of this Act or other applications of such provision shall not be affected. Every agency is granted all authority necessary to comply with the requirements of this Act through the issuance of rules or otherwise. No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly. This Act shall take effect three months after its approval except that sections 7 and 8 shall take effect six months after such approval, the requirement of the selection of examiners pursuant to section 11 shall not become effective until one year after such approval, and no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement.

Approved June 11, 1946.

APPENDIX B

OFFICE OF THE ATTORNEY GENERAL,
Washington, D. C., October 19, 1945.

Hon. Pat McCarran,
Chairman, Senate Judiciary Committee,
United State Senate, Washington, D. C.

My Dear Senator: You have asked me to comment on S. 7, a bill to improve the administration of justice by prescribing fair administrative procedure, in the form in which it appears in the revised committee print issued October 5, 1945.

I appreciate the opportunity to comment on this proposed legislation.

For more than a decade there has been pending in the Congress legislation in one form or another designed to deal horizontally with the subject of administrative procedure, so as to overcome the confusion which inevitably has resulted from leaving to basic agency statutes the prescription of the procedures to be followed or, in many instances, the delegation of authority to agencies to prescribe their own procedures. Previous attempts to enact general procedural legislation have been unsuccessful generally because they failed to recognize the significant and inherent differences between the tasks of courts and those of administrative agencies or because, in their zeal for simplicity and uniformity, they propose too narrow and rigid a mold.

Nevertheless, the goal toward which these efforts have been directed is, in my opinion, worth while. Despite difficulties of draftsmanship, I believe that over-all procedural legislation is possible and desirable. The administrative process is now well developed. It has been subject in recent years to the most intensive and informed study—by various congressional committees, by the Attorney General's Committee on Administrative Procedure, by organizations such as the American Bar Association, and by many individual practitioners and legal scholars. We have in general—as we did not have until fairly recently—the materials and facts at hand. I think the time is ripe for some measure of control and prescription by legislation. I cannot agree that there is anything inherent in the subject of administrative procedure, however complex it may be, which defies workable codification.

Since the original introduction of S. 7, I understand that opportunity has been afforded to public and private interests to study its provisions and to suggest amendments. The agencies of the Government primarily concerned have been consulted and their views considered. In particular, I am happy to note that your committee and the House Committee on the Judiciary, in an effort to reconcile the views of the interested parties, have consulted officers of this Department and experts in administrative law made available by this Department.

The revised committee print issued October 5, 1945, seems to me to achieve a considerable degree of reconciliation between the views expressed by the various Government agencies and the views of the proponents of the legislation. The bill in its present form requires administrative agencies to publish or make available to the public an increased measure of information concerning their organization, functions, and procedures. It gives to that portion of the public which is to be affected by administrative regulations an opportunity to express its views before the regulations become effective. It prescribes, in instances in which existing statutes afford opportunity for hearing in connection with the formulation and issuance of administrative rules and orders, the procedures which shall govern such hearings. It provides for the selection of hearing officers on a basis designed to obtain highly qualified and impartial personnel and to insure their security of tenure. It also restates the law governing judicial review of administrative action.

The bill appears to offer a hopeful prospect of achieving reasonable uniformity and fairness in administrative procedures without at the same time interfering unduly with the efficient and economical operation of the Government. Insofar as possible, the bill recognizes the needs of individual agencies by appropriate exemption of certain of their functions.

After reviewing the committee print, therefore, I have concluded that this Department should recommend its enactment.

My conclusion as to the workability of the proposed legislation rest on my belief that the provisions of the bill can and should be construed reasonably and in a sense which will fairly balance the requirements and interests of private persons and governmental agencies. I think it may be advisable for me to attach to this report an appendix discussing the principle provisions of the bill. This may serve to clarify some of the essential issues, and may assist the committee in evaluating the impact of the bill on public and private interests.

I am advised by the Acting Director of the Bureau of the Budget that while there would be no objection to the submission of this report, he questions the appropriateness of the inclusion of the words "independently of agency recommendations or ratings," appearing after the words "Examiners shall receive compensation prescribed by the [Civil Service] Commission" in section 11 of the bill, inasmuch as he deems it highly desirable that agency recommendations and ratings be fully considered by the Commission.

With kind personal regards.

Sincerely yours,

TOM C. CLARK,
Attorney General

APPENDIX TO ATTORNEY GENERAL'S STATEMENT REGARDING REVISED COMMITTEE PRINT OF OCTOBER 5, 1945

Section 2: The definitions given in section 2 are of very broad character. It is believed, however, that this scope of definition will not be found to have any unexpected or unfortunate consequences in particular cases, inasmuch as the operative sections of the act are themselves carefully limited.

"Courts" includes the Tax Court, Court of Customs and Patent Appeals, the Court of Claims, and similar courts. This act does not apply to their procedure nor affect the requirement of resort thereto.

In section 2 (a) the words "agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them" are intended to refer to the following, among others: National War Labor Board and the National Railroad Adjustment Board.

In section 2 (c) the phrase "the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances," etc., is not, of course, intended to be an exhaustive enumeration of the types of subject matter of rule making. Specification of these particular subjects is deemed desirable, however, because there is no unanimity of recognition that they are, in fact, rule making. The phrase "for the future" is designed to differentiate, for example, between the process of prescribing rates for the future and the process of determining the lawfulness of rates charged in the past. The latter, of course, is "adjudication" and not "rule making." (*Arizona Grocery Co.* v. *Atchison, Topeka, and Santa Fe Railway Co.* (284 U.S. 370).)

The definitions of "rule making" and "adjudication," set forth in subsections (c) and (d) of section 2, are especially significant. The basic scheme underlying this legislation is to classify all administrative proceedings into these two categories. The pattern is familiar to those who have examined the various proposals for administrative procedure legislation which have been introduced during the past few years; it appears also in the recommendations of the Attorney General's Committee on Administrative Procedure. Proceedings are classed as rule making under this act not merely because, like the legislative process, they result in regulations of general applicability but also because they involve subject matter demanding judgments based on technical knowledge and experience. As defined in subsection (c), for example, rule making includes not only the formulation of rules of general applicability, but also the formulation of agency action whether of general or particular applicability, relating to the types of subject matter enumerated in subsection (c). In many instances of adjudication, on the other hand, the accusatory element is strong, and individual compliance or behavior is challenged; in such cases, special procedural safeguards should be provided to insure fair judgments on the facts as they may properly appear of record. The statute carefully differentiates between these two basically different classes of proceedings so as to avoid, on the one hand, too cumbersome a procedure and to require, on the other hand, an adequate procedure.

Section 3: This section applies to all agencies covered by the act, including war agencies and war functions. The exception of any function of the United States requiring secrecy in the public interest is intended to cover (in addition to military, naval, and foreign affairs functions) the confidential operations of the Secret Service, the Federal Bureau of Investigation, United States attorneys, and other prosecuting agencies, as well as the confidential functions of any other agency.

Section 3 (a), by requiring publication of certain classes of information in the Federal Register, is not intended to repeal the Federal Register Act (44 U. S. C. 301 et seq.) but simply to require the publication of certain additional material.

Section 3 (a) (4) is intended to include (in addition to substantive rules) only such statements of general policy or interpretations as the agency believes may be formulated with a sufficient degree of definiteness and completeness to warrant their publication for the guidance of the public.

Section 3 (b) is designed to make available all final opinions or orders in the adjudication of cases. Even here material may be held confidential if the agency finds good cause. This confidential material, however, should not be cited as a precedent. If it is desired to rely upon the citation of confidential material, the agency should first make available some abstract of the confidential material in such form as will show the principles relied upon without revealing the confidential facts.

Section 3 (c) is not intended to open up Government files for general inspection. What is intended is that the agencies, to the degree of specificity practicable, shall classify its material in terms of whether or not it is confidential in character and shall set forth in published rules the information or type of material which is confidential and that which is not.

Section 4. The term "naval" in the first exception clause is intended to include the defense functions of the Coast Guard and the Bureau of Marine Inspection and Navigation.

Section 4 (b), in requiring the publication of a concise general statement of the basis and purpose of rules made without formal hearing, is not intended to require an elaborate analysis of rules or of the detailed considerations upon which they are based, but is designed to enable the public to obtain a general idea of the purpose of, and a statement of the basic justification for, the rules. The requirement would also serve much the same function as the whereas clauses which are now customarily found in the preambles of Executive orders.

Section 4 (c): This subsection is not intended to hamper the agencies in cases in which there is good cause for putting a rule into effect immediately, or at some time earlier than 30 days. The section requires, however, that where an earlier effective date is desired the agency should make a finding of good cause therefor and publish its finding along with the rule.

Section 4 (d) simply permits any interested person to petition an agency for the issuance, amendment, or repeal of a rule. It requires the reception and consideration of petitions, but does not compel an agency to undertake any rule-making procedure merely because a petition is filed.

SEC. 5. Subject to the six exceptions set forth at the commencement of the section, section 5 applies to administrative adjudications "required by statute to be determined on the record after opportunity for an agency hearing." It is thus limited to cases in which the Congress has specifically required a certain type of hearing. The section has no application to rule making, as defined in section 2 (c). The section does apply, however, to licensing with the exception that section 5 (c), relating to the separation of functions, does not apply in determining applications for initial licenses, i. e., original licenses as contradistinguished from renewals or amendments of existing licenses.

If a case falls within one of the six exceptions listed at the opening of section 5, no provision of section 5 has any application to that case; such a case would be governed by the requirements of other existing statutes.

The first exception is intended to exempt, among other matters, certain types of reparation orders assessing damages, such as are issued by the Interstate Commerce Commission and the Secretary of Agriculture, since such orders are admissible only as prima facie evidence in court upon attempted enforcement proceedings or (at least in the case of reparation orders issued by the Secretary of Agriculture under the Perishable Agricultural Commodities Act) on the appeal of the losing party. Reparation orders involving in part an admistrative determination of the reasonableness of rates in the past so far as they are not subject to trial de novo would be subject to the provisions of section 5 generally but they have been specifically exempted from the segregation provisions of section 5 (c). In the fourth exception the term "naval" is intended to include adjudicative defense functions of the Coast Guard and the Bureau of Marine Inspection and Navigation, where such functions pertain to national defense.

Section 5 (a) is intended to state minimum requirements for the giving of notice to persons who under existing law are entitled to notice of an agency hearing in a statutory adjudication. While in most types of proceedings all of the information required to be given in clauses (1), (2), and (3) may be included in the "notice of hearing" or other moving paper, in many instances the agency or other moving party may not be in position to set forth all of such information in the moving paper, or perhaps not even in advance of the hearing, especially the "matters of fact and law asserted." The first sentence of this subsection merely requires that the information specified should be given as soon as it can be set forth and, in any event, in a sufficiently timely manner as to afford those entitled to the information an adequate opportunity to meet it. The second sentence complements the first and requires agencies and other parties promptly to reply to moving papers of private persons or permits agencies to require responsive pleading in any proceedings.

Section 5 (c) applies only to the class of adjudicatory proceedings included within the scope of section 5, i. e., cases of adjudication required by statute to be determined after opportunity for an agency hearing, and then not falling within one of the six excepted situations listed at the opening of section 5. As explained in the comments with respect to section 5 generally, this

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subsection does not apply either in proceedings to determine applications for initial licenses or in those to determine the reasonableness of rates in the past.

In the cases to which this subsection is applicable, if the informal procedures described in section 5 (b) (1) are not appropriate or have failed, a hearing is to be held as provided in sections 7 and 8. At such hearings the same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision "required by section 8" except where such officers become unavailable to the agency. The reference to section 8 is significant. Section 8 (a) provides that, in cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 5, an officer or officers qualified to preside at hearings pursuant to section 7) shall make the initial or recommended decision, as the case may be. It is plain, therefore, that in cases subject to section 5(c) only the officer who presided at the hearing (unless he is unavailable for reasons beyond the agency's control) is eligible to make the initial or recommended decision, as the case may be.

This subsection further provides that in the adjudicatory hearings covered by it no presiding officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate (except to the extent required for the disposition of ex parte matters as authorized by law). The term "fact in issue" is used in its technical, litigious sense.

In most of the agencies which conduct adjudicative proceedings of the types subject to this subsection, the examiners are placed in organizational units apart from those to which the investigative or prosecuting personnel are assigned. Under this subsection such an arrangement will become operative in all such agencies. Further, in the adjudicatory cases covered by section 5 (c), no officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision or agency review pursuant to section 8 except as witness or counsel in public proceedings. However, section 5 (c) does not apply to the agency itself or, in the case of a multiheaded agency, any member thereof. It would not preclude, for example, a member of the Interstate Commerce Commission personally conducting or supervising an investigation and subsequently participating in the determination of the agency action arising out of such investigation.

Section 5 (c), applying as it does only to cases of adjudication (except determining applications for initial licenses or determining reasonableness of rates in the past) within the scope of section 5 generally, has no application whatever to rule making, as defined in section 2 (c). As explained in the comment on section 2 (c), rule making includes a wide variety of subject matters, and within the scope of those matters it is not limited to the formulation of rules of general applicability but includes also the formulation of agency action whether of general or particular application, for example, the reorganization of a particular company.

Section 5 (d) : Within the scope of section 5 (i. e., in cases of adjudication required by statute to be determined on the record after opportunity for an agency hearing, subject to certain exceptions) the agency is authorized to issue a declaratory order to terminate a controversy or remove uncertainty. Where declaratory orders are found inappropriate to the subject matter, no agency is required to issue them.

Section 6: Subsection (a), in stating a right of appearance for the purpose of settling or informally determining the matter in controversy, would not obtain if the agency properly determines that the responsible conduct of public business does not permit. It may be necessary, for example, to set the matter down for public hearing without preliminary discussion because a statute or the subject matter or the special circumstances so require.

It is not intended by this provision to require the agency to give notice to all interested persons, unless such notice is otherwise required by law.

This subsection does not deal with, or in any way qualify, the present power of an agency to regulate practice at its bar. It expressly provides, moreover, that nothing in the act shall be construed either to grant or to deny the right of nonlawyers to appear before agencies in a representative capacity. Control over this matter remains in the respective agencies.

Section 6 (b) : The first sentence states existing law. The second sentence is new.

Section 6 (c) : The first sentence entitles a party to a subpena upon a statement or showing of general relevance and reasonable scope of the evidence sought. The second sentence is intended to state the existing law with respect to the judicial enforcement of subpenas.

Section 6 (d) : The statement of grounds required herein will be very simple, as contrasted with the more elaborate findings which are customarily issued to support an order.

Section 7: This section applies in those cases of statutory hearing which are required by sections 4 and 5 to be conducted pursuant to section 7. Subject to the numerous exceptions contained in sections 4 and 5, they are cases in which an order or rule is to be made upon the basis of the record in a statutory hearing.

Section 7 (a) : The subsection is not intended to disturb presently existing statutory provisions which explicity provide for certain types of hearing officers. Among such are (1) joint hearings before officers of the Federal agencies and persons designated by one or more States, (2) where officers of more than one agency sit, (3) quota allotment cases under the Agricultural Adjustment Act of 1938, (4) Marine Casualty Investigation Boards, (5) registers of the General Land Office, (6) special boards set up to review the rights of disconnected servicemen (38 U. S. C. 693h) and the rights of veterans to special unemployment compensation (38 U.S.C. 696h), and (7) boards of employees authorized under the Interstate Commerce Act (49 U. S. C. 17 (2)).

Subject to this qualification, section 7 (a) requires that there shall preside at the taking of evidence one or more examiners appointed as provided in this act, unless the agency itself or one or more of its members presides. This provision is one of the most important provisions in the act. In many agencies of the Government this provision may mean the appointment of a substantial number of hearing officers having no other duties. The resulting expense to the Government may be increased, particularly in agencies where hearings are now conducted by employees of a subordinate status or by employees having duties in addition to presiding at hearings. On the other hand, it is contemplated that the Civil service Commission, which is empowered under the provisions of section 11 to prescribe salaries for hearing officers, will establish various salary grades in accordance with the nature and importance of the duties performed, and will assign those in the lower grades to duties now performed by employees in the lower brackets. It may also be possible for the agencies to reorganize their staffs so as to permit the appointment of full-time hearing officers by reducing the number of employees engaged on other duties.

This subsection further provides for withdrawal or removal of examiners disqualified in a particular proceeding. Some of the agencies have voiced concern that this provision would permit undue delay in the conduct of their proceedings because of unnecessary hearings or other procedure to determine whether affidavits of bias are well founded. The provision does not require hearings in every instance but simply requires such procedure, formal or otherwise, as would be necessary to establish the merits of the allegations of bias. If it is manifest that the charge is groundless, there may be prompt disposition of the matter. On the other hand, if the affidavit appears to have substance, it should be inquired into. In any event, whatever procedure the agency deems appropriate must be made a part of the record in the proceeding in which the affidavit is filed.

Section 7 (b): The agency may delegate to a hearing officer any of the enumerated powers with which it is vested. The enumeration of the powers of hearing officers is not intended to be exclusive.

Section 7 (c): The first sentence states the customary rule that the proponent of a rule or order shall have the burden of proof. Statutory exceptions to the rule are preserved. Parties shall have the right to conduct such cross-examination as may be required for a full and true disclosure of the facts. This is not intended to disturb the existing practice of submitting technical written reports, summaries, and analyses of material gathered in field surveys, and other devices appropriately adapted to the particular issues involved in specialized proceedings. Whether the agency must in such cases produce the maker of the report depends, as it does under the present law, on what is reasonable in all the circumstances.

It may be noted that agencies are empowered, in this subsection, to dispense with oral evidence only in the types of proceedings enumerated; that is, in instances in which normally it is not necessary to see and hear the witnesses in order properly to appraise the evidence. While there may be types of proceedings other than those enumerated in which the oral testimony of the witnesses is not essential, in such instances the parties generally consent to submission of the evidence in written form so that the inability of the agency to compel submission of written evidence would not be burdensome.

The provision regarding "evidence in written form" does not limit the generality of the prevailing principle that "any evidence may be received"; that is, that the rules of evidence as such are not applicable in administrative proceedings, and that all types of pertinent evidentiary material may be considered. It is assumed, of course, that agencies will, in the words of the Attorney General's Committee on Administrative Procedure, rely only on such evidence (whether written or oral) as is "relevant, reliable, and probative." This is meant as a guide, but the courts in reviewing an order are governed by the provisions of section 10 (e), which states the "substantial evidence" rule.

Section 7 (d): The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision, in the cases covered by section 7. This follows from the proposition that sections 7 and 8 deal only with cases where by statute the decision is to be based on the record of hearing. Further, section 7 is limited by the exceptions contained in the opening sentences of sections 4 and 5; accordingly, certain special classes of cases, such as those where decisions rest solely on inspections, tests, or elections, are not covered. The second sentence of the subsection enables the agency to take official notice of material facts which do not appear in the record, provided the taking of such notice is stated in the record or decision, but in such cases any party affected shall, on timely request, be afforded an opportunity to show the contrary.

Section 8: This section applies to all hearings held under section 7.

Section 8 (a): Under this subsection either the agency or a subordinate hearing officer may make the initial decision. As previously observed with respect to subsection (c) of section 5, in cases to which that subsection is applicable the same officer who personally presided over the hearing shall make such decision if it is to be made by a subordinate hearing officer. The agency may provide that in all cases the agency itself is to make the initial decision, or after the hearing it may remove a particular case from a subordinate hearing officer and thereupon make the initial decision. The initial decision of the hearing officer, in the absence of appeal to or review by the agency, is (or becomes) the decision of the agency. Upon review the agency may restrict its decision to questions of law, or to the question of whether the findings are supported by substantial evidence or the weight of evidence, as the nature of the case may be. On the other hand, it may make entirely new findings either upon the record or upon new evidence which it takes. It may remand the matter to the hearing officer for any appropriate further proceedings.

The intention underlying the last sentence of this subsection is to require the adoption of a procedure which will give the parties an opportunity to make their contentions to the agency before the issuance of a final agency decision. This sentence states as a general requirement that, whenever the agency makes the initial decision without having presided at the reception of the evidence, a recommended decision shall be filed by the officer who presided at the hearing (or, in cases not subject to section 5 (c), by any other officer qualified to preside at section 7 hearings). However, this procedure need not be followed in rule making or in determining applications for initial licenses (1) if, in lieu of a recommended decision by such hearing officer, the agency issues a tentative decision; (2) if, in lieu of a recommended decision by such hearing officer, a recommended decision is submitted by any of the agency's responsible officers; or (3) if, in any event, the agency makes a record finding that "due and timely execution of its function imperatively and unavoidably so requires."

Subsection (c) of section 5, as explained in the comments on that subsection, does not apply to rule making. The broad scope of rule making is explained in the notes to subsection (c) of section 2.

The second exception permits, in proceedings to make rules and to determine applications for initial licenses, the continuation of the widespread agency practice of serving upon the parties, as a substitute for either an examiner's report or a tentative agency report, a report prepared by the staff of specialists and technicians normally engaged in that portion of the agency's operations to which the proceeding in question relates. The third exception permits, in lieu of any sort of preliminary report, the agency to issue forthwith its final rule or its order granting or denying an initial license in the emergent instances indicated. The subsection, however, requires that an examiner issue either an initial or a recommended decision, as the case may be, in all cases subject to section 7 except rule making and determining applications for initial licenses. The act permits no deviation from this requirement, unless, of course, the parties waive such procedure.

Section 8 (b): Prior to each recommended, initial, or tentative decision, parties shall have a timely opportunity to submit proposed findings and conclusions, and, prior to each decision upon agency review of either the decision of subordinate officers or of the agency's tentative decision, to submit exceptions to the initial, recommended, or tentative decision, as the case may be. Subject to the agency's rules, either the proposed findings or the exceptions may be oral in form where such mode of presentation is adequate.

Section 9: Subsection (a) is intended to declare the existing law. Subsection (b) is intended to codify the best existing law and practice. The second sentence of subsection (b) is not intended to apply to temporary licenses which may be issued pending the determination of applications for licenses.

Section 10: This section, in general, declares the existing law concerning judicial review. It provides for judicial review except insofar as statutes preclude it, or insofar as agency action is by law committed to agency discretion. A statute may in terms preclude judicial review or be interpreted as manifesting a congressional intention to preclude judicial review. Examples of such interpretation are: *Switchmen's Union of North America* v. *National Mediation Board* (320 U. S. 297); *American Federation of Labor* v. *National Labor Relations Board* (308 U. S. 401); *Butte, Anaconda & Pacific Railway Co.* v. *United States* (290 U. S. 127). Many matters are committed partly or wholly to agency discretion. Thus, the courts have held that the refusal by the National Labor Relations Board to issue a complaint is an exercise of discretion unreviewable by the courts (*Jacobsen* v. *National Labor Relations Board,* 120 F. (2d) 96 (C. C. A. 3d); *Marine Engineers' Beneficial Assn.* v. *National Labor Relations Board,* decided April 8, 1943 (C. C. A. 2d). certiorari denied, 320 U. S. 777). In this act, for example, the failure to grant a petition filed under section 4 (d) would be similarly unreviewable.

Section 10 (a): Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review of such action. This reflects existing law. In *Alabama Power Co.* v. *Ickes* (302 U. S. 464), the Supreme Court stated the rule concerning persons entitled to judicial review. Other cases having an important bearing on this subject are

Massachusetts v. *Mellon* (262 U. S. 447), *The Chicago Junction Case* (264 U. S. 258), *Sprunt & Son* v. *United States* (281 U. S. 249), and *Perkins* v. *Lukens Steel Co.* (310 U. S. 113). An important decision interpreting the meaning of the terms "aggrieved" and "adversely affected" is *Federal Communications Commission* v. *Sanders Bros. Radio Station* (309 U. S. 470).

Section 10 (b) : This subsection requires that, where a specific statutory method is provided for reviewing a given type of case in the courts, that procedure shall be used. If there is no such procedure, or if the procedure is inadequate (i. e., where under existing law a court would regard the special statutory procedure as inadequate and would grant another form of relief), then any applicable procedure, such as prohibitory or mandatory injunction, declaratory judgment, or habeas corpus, is available. The final sentence of the subsection indicates that the question of the validity of an agency action may arise in a court proceeding to enforce the agency action. The statutes presently provide various procedures for judicial enforcement of agency action, and nothing in this act is intended to disturb those procedures. In such a proceeding the defendant may contest the validity of the agency action unless a prior, adequate, and exclusive opportunity to contest or review validity has been provided by law.

Section 10 (c) : This subsection states (subject to the provisions of section 10 (a)) the acts which are reviewable under section 10. It is intended to state existing law. The last sentence makes it clear that the doctrine of exhaustion of administrative remedies with respect to finality of agency action is intended to be applicable only (1) where expressly required by statute (as, for example, is provided in 49 U. S. C. 17 (9)) or (2) where the agency's rules require that decisions by subordinate officers must be appealed to superior agency authority before the decision may be regarded as final for purposes of judicial review.

Section 10 (d) : The first sentence states existing law. The second sentence may be said to change existing law only to the extent that the language of the opinion in *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission* (316 U.S. 4, 14), may be interpreted to deny to reviewing courts the power to permit an applicant for a renewal of a license to continue to operate as if the original license had not expired, pending conclusion of the judicial review proceedings. In any event, the court must find, of course, that granting of interim relief is necessary to prevent irreparable injury.

Section 10 (e) : This declares the existing law concerning the scope of judicial review. The power of the court to direct or compel agency action unlawfully withheld or unreasonably delayed is not intended to confer any nonjudicial functions or to narrow the principle of continuous administrative control enunciated by the Supreme Court in *Federal Communications Commission* v. *Pottsville Broadcasting Co.* (309 U. S. 134). Clause (5) is intented to embody the law as declared, for example, in *Consolidated Edison Co.* v. *National Labor Relations Board* (305 U. S. 197). There the Chief Justice said: "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion (p. 229) * * * assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force" (p. 230).

The last sentence of this section makes it clear that not every failure to observe the requirements of this statute or of the law is ipso facto fatal to the validity of an order. The statute adopts the rule now well established as a matter of common law in all jurisdictions that error is not fatal unless prejudicial.

Sec. 11: This section provides for the appointment, compensation, and tenure of examiners who will preside over hearings and render decisions pursuant to section 7 and 8. The section provides that appointments shall be made "subject to the civil service and other laws to the extent not inconsistent with this act". Appointments are to be made by the respective employing agencies of personnel determined by the Civil Service Commission to be qualified and competent examiners. The examiners appointed are to serve only as examiners except that, in particular instances (especially where the volume of hearings under a given statute or in a given agency is not very great), examiners may be assigned additional duties which are not inconsistent with or which do not interfere with their duties as examiners. To insure equality of participation among examiners in the hearing and decision of cases, the agencies are required to use them in rotation so far as may be practicable.

Examiners are subject to removal only for good cause "established and determined" by the Commission. The Commission must afford the examiner a hearing, if requested, and must rest its decision solely upon the basis of the record of such hearing. It should be noted that the hearing and the decision are to be conducted and made pursuant to the provisions of section 7 and 8.

Section 11 provides further that the Commission shall prescribe the compensation of examiners, in accordance with the compensation schedules provided in the Classification Act, except that the efficiency rating system set forth in that act shall not be applicable to examiners.

Sec. 12: The first sentence of section 12 is intended simply to indicate that the act will be interpreted as supplementing constitutional and legal requirements imposed by existing law.

The section further provides that "no subsequent legislation shall be held to supersede or modify the provisions of this act except to the extent that such legislation shall do so expressly". It is recognized that no congressional legislation can bind subsequent sessions of the Congress. The present act can be repealed in whole or in part at any time after its passage. However, the act is intended to express general standards of wide applicability. it is believed that the courts should as a rule of construction interpret the act as applicable on a broad basis, unless some subsequent act clearly provides to the contrary.

Judicial Review of Agency Action

Citations:

5 U.S.C. §§701-706, originally enacted as Administrative Procedure Act §10; significantly amended by Pub. L. No. 94-574, 90 Stat. 2721; 28 U.S.C. §§1331, 2112, 2341-51.

Overview:

APA Provisions. The principal statutory authority governing judicial review of agency action is 5 U.S.C. §§701-706, which codifies section 10 of the Administrative Procedure Act. (The APA's text may be found in the Appendix to Chapter 1.) Sections 701-706 constitute a general restatement of the principles of judicial review embodied in many statutes and judicial decisions; however, they leave the mechanics regarding judicial review to be governed by other statutes or court rules.[1]

Section 701 embodies the basic presumption that judicial review is available as long as no statute precludes such relief or the action is not one committed by law to agency discretion. (*Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967); *Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971)). Preliminary or interlocutory actions are ordinarily reviewable only on review of the final agency action. (See, e.g., *Association of National Advertisers, Inc. v. FTC*, 565 F.2d 237 (2d Cir. 1977)). In those situations where preliminary or interlocutory actions are immediately reviewable, any suit seeking such relief that might affect a court of appeals' jurisdiction over a final agency decision is subject to exclusive review in the court of appeals rather than district court. (See *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984).)

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[1] *Attorney General's Manual on the Administrative Procedure Act* 93 (1947).

Section 702 is designed to govern the issue of who has standing to challenge agency action.[2] It sets forth the general principle that a person suffering legal wrong or adversely affected or aggrieved by agency action is entitled to judicial review of that action. The phrase "legal wrong" merely connotes such wrong as statutes or court decisions identify as constituting grounds for judicial review. The determination of who is "adversely affected or aggrieved" reflects judicial evolution of the law of standing; the courts make their determination based on constitutional and statutory requirements.[3]

Section 703 deals with the form and venue of the judicial review proceeding. Briefly, there are three types of review proceedings:

- "Statutory review," a review proceeding specifically provided by statute for the agency action in question (e.g., a proceeding to review a rule of the Federal Trade Commission under 15 U.S.C. §57a(e));

- "Nonstatutory review," a review through a suit against the agency or its officers for declaratory or injunctive relief or habeas corpus in a court of competent jurisdiction;

- A civil or criminal enforcement proceeding instituted by the government or possibly by a private party that involves the validity of agency action.

Where a statutory proceeding is provided, such review is frequently, though not always, in the courts of appeals. Nonstatutory review proceedings and enforcement proceedings are almost invariably brought in the U.S. district courts. Where there is an adequate statutory review provided, a party may not seek nonstatutory review. However, review is available in an enforcement proceeding except where a prior opportunity for judicial review was adequate and expressly or impliedly exclusive.[4]

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[2] Davis, 4 Administrative Law Treatise 219-20 (1983).

[3] *Attorney General's Manual on the Administrative Procedure Act* 96 (1947).

[4] *Id.* at 99-100.

Section 704 provides that "agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." Agency action under the APA "includes the whole or a part of any agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. §551(13).

Section 705 authorizes a reviewing court to postpone the effectiveness of agency action or preserve the status or rights affected by an agency's order pending completion of judicial review proceedings. The standards for deciding requests for stays of agency action are set out in *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921 (D.C. Cir. 1958), as elaborated by the court's decisions in *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977), *Wisconsin Gas Co. v. FERC*, 758 F.2d 669 (D.C. Cir. 1985), and *Cuomo v. NRC*, 772 F.2d 972 (D.C. Cir. 1985).

Section 706 sets forth the scope of review of agency actions. The case law on the subject of scope of review is rich and varied and cannot easily be summed up. In general, the scope of review depends on the nature of the agency determination under challenge. Agency conclusions on questions of law are reviewed *de novo*. When a court reviews an agency's construction of the statute it administers the court is required to uphold Congress' intent where Congress has directly spoken to the precise statutory question at issue. If the statute is silent or ambiguous with respect to the specific issue, however, the agency's interpretation of the statute must be upheld if the agency's construction of the statute is permissible. (See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, *reh'g denied* 468 U.S. 1227 (1984); *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987)).

Agency exercises of judgment or discretion are reviewed under the "arbitrary, capricious, abuse of discretion" standard. Under this standard, an agency determination will by upheld if it is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency by statute. The agency must examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choices made. A court is not to substitute its judgment for that of the agency. (See *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983)).

Agency determinations of fact are reviewed under the "substantial evidence" test when the agency determination is reviewed on the record of an agency hearing required by statute. (See *Consolo v. FMC*, 383 U.S. 607, 618-21 (1966), citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).) Otherwise, factual determinations are also subject to the arbitrary or capricious standard, except for the fairly unusual situation in which the facts are subject to trial *de novo* by the reviewing court. However, the courts themselves have difficulty in applying the fine distinction between the arbitrary or capricious and the substantial evidence tests. The tests converge where an agency's determination is based on a mix of factual and judgmental conclusions (see, e.g., *Amoco Oil Co. v. EPA*, 501 F.2d 722, 739-741 (D.C. Cir. 1974)) and may be identical where an agency's factual support is concerned. (See *Ass'n of Data Processing Service Organizations, Inc. v. Board Governors of the Federal Reserve System*, 745 F.2d 677 (D.C. Cir. 1984).)

Section 706 contains a rule of harmless error. A court will not overturn an agency's decision even if the agency committed some error unless the error was genuinely harmful or prejudicial. (See *Dolcin Corp. v. FTC*, 219 F.2d 742 (D.C. Cir. 1954), *cert. denied* 348 U.S. 981 (1955).)

Illustrative Statutory Provision. The Administrative Orders Review Act (28 U.S.C. §§2341-2351) is a special statutory provision governing review of the actions of several different agencies. It provides for review in the courts of appeals for certain final orders of the Federal Communications Commission, the Secretary of Agriculture (under the Packers and Stockyards Act and the Perishable Agricultural Commodities Act), the Federal Maritime Commission, the Maritime Administration, the Nuclear Regulatory Commission and the Interstate Commerce Commission, and it specifies the procedure for instituting such review proceedings. Venue of the proceedings is in the judicial circuit where the petitioner resides or has its principal office or in the Court of Appeals for the District of Columbia Circuit (28 U.S.C. §2343).

The "orders" that may be reviewed under the Administrative Orders Review Act include not only final orders in adjudicative proceedings, but also orders promulgating agency rules of general applicability (see *Gage v. U.S. Atomic Energy Commission*, 479 F.2d 1214, 1218-19 (D.C. Cir. 1973); *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956)). However, because under 28 U.S.C. §2344, a review proceeding may be initiated by "any party aggrieved by the final order," some courts have held that one who did not participate in the administrative proceeding resulting in the order may not seek review under the Act (*Gage v. U.S. Atomic Energy Commission*, 479 F.2d at 1217-18).

Section 2344 provides that review must be sought within 60 days of the entry of the agency order about which a person complains. Failure to seek judicial review within 60 days renders a request for review untimely. (See *B.J. McAdams, Inc. v. ICC*, 551 F.2d 1112 (8th Cir. 1977).) This requirement may create problems with respect to persons seeking relief from a rule some time after its issuance. Where a dispute over a rule arises after its issuance, some courts will deem the 60-day period to run from the agency's denial of the party's request for amendment or waiver of the rule, rather than from the issuance date (*Cf. Baltimore Gas & Electric Co. v. ICC*, 672 F.2d 146, 149-50 (D.C. Cir. 1982); *Investment Co. Institute v. Board of Governors of the Federal Reserve System*, 551 F.2d 1270, 1280-82 (D.C. Cir. 1977); *Gage v. U.S. Atomic Energy Commission*, 479 F.2d at 1222).

Sovereign Immunity. For many years proceedings for nonstatutory review were subject to possible dismissal on the ground that the government had not consented to be sued. The case law on the availability of the sovereign immunity defense was in hopeless disarray, but a careful pleader could usually bring his case within one of the recognized exceptions to the doctrine. In 1976 in response to recommendations from the Conference and the American Bar Association, Congress enacted Pub. L. No. 94-574, which amended 5 U.S.C. §702 to abolish the defense of sovereign immunity in any action in a court of the United States seeking relief other than money damages and based on a claim that an agency or officer acted or failed to act in an official capacity or under color of legal authority. It is important to emphasize that the purpose of Pub. L. No. 94-574 was to abolish the technical defense of sovereign immunity in proceedings for nonstatutory review (*Food Town Stores, Inc. v. EEOC*, 708 F.2d 920, 922 (4th Cir. 1983), *cert. denied* 465 U.S. 1005 (1984)), and not to eliminate other more substantive limitations on judicial review such as the plaintiff's lack of standing or failure to exhaust administrative remedies, or that the action in question is not ripe for review. Pub. L. No. 94-574 also eliminated several other technical obstacles to suits for judicial review.[5]

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[5] In addition to amending section 702 to abolish the defense of sovereign immunity, Pub. L. No. 94-574 amended section 703 to deal with the problem of misnomer of government defendants, amended 28 U.S.C. §1331(a) to permit nonstatutory review cases to be brought in district courts on the basis of federal question jurisdiction without regard to the amount in controversy, and amended 28 U.S.C. §1391(e) to permit a plaintiff to use the

Jurisdiction. Where the relevant statute expressly provides for judicial review in a particular court or courts, the statute itself operates as a grant of subject matter jurisdiction to the courts specified. In 1977 the Supreme Court, resolving a longstanding conflict of views, held that the Administrative Procedure Act, section 702, was not itself a grant to the federal district courts of jurisdiction over review proceedings (*Califano v. Sanders*, 430 U.S. 99 (1977)). Consequently, the jurisdictional basis for proceedings for review other than those expressly provided for by statute must be found elsewhere, such as chapter 85 of title 28, U.S.C., which describes the jurisdiction of United States district courts. Section 1331 of title 28, which grants the district courts original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States, provides an adequate jurisdictional basis for substantially any review proceeding challenging agency action. Prior to 1976 section 1331 could be invoked only when the amount in controversy was at least $10,000. However, Pub. L. No. 94-574, the statute that abolished the sovereign immunity defense, also eliminated the jurisdictional amount in actions against the United States or its officers; in 1980 the jurisdictional amount was deleted in all cases under section 1331.

In the Federal Courts Improvement Act of 1982, Congress authorized any federal court without jurisdiction over a civil action that is filed with it (including a petition for review of agency action) to transfer the action to a court where such cases could have been brought in the first instance, if it is in the interest of justice to do so. 28 U.S.C. §1631. See, generally, *Air Line Pilots Ass'n, Int'l v. CAB*, 750 F.2d 81, 84-85 (D.C. Cir. 1984).

Forum Selection. 28 U.S.C. §2112 governs the procedures for filing the record on review by the agency in the courts of appeals and the resolution of conflicts where proceedings have been instituted in two or more courts of appeals with respect to the same agency order. Section 2112(a) provides that the agency shall file the record (or, if local court rules permit, a certified list of the materials comprising the record) in a designated court of appeals. If only a single petition for review is filed within 10 days after issuance of an agency's order, the agency shall file the record in

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section's provisions for broad venue and extraterritorial service of process against government defendants despite the presence in the action of a nonfederal defendant. These changes had all been recommended by the Administrative Conference. See S. Rep. No. 94-996 and H.R. Rep. No. 94-1656, 94th Cong. 2d Sess., 1976 U.S. Code Cong. & Ad. News 6121.

that court of appeals notwithstanding the subsequent institution of any other court proceedings for review of the same order. If two or more petitions for review of the same agency order are filed in different courts of appeals within 10 days after issuance of the agency's order, the agency shall notify the judicial panel on multidistrict litigation, which shall by means of random selection designate one court of appeals from among the courts in which petitions were filed to hear the case; the panel shall consolidate all petitions for review in that court and the agency shall thereafter file the record in the designated court. In all other circumstances, the agency shall file the record in the court of appeals in which proceedings with respect to the order were first instituted. The random selection provisions in section 2112(a)(3) were established by Pub. L. No. 100-236, 101 Stat. 1731 (1988), to implement the Conference's recommendation to eliminate so-called "races to the courthouse" (Administrative Conference Recommendation 80-5, *Eliminating or Simplifying the "Race to the Courthouse" in Appeals from Agency Action*, 1 CFR §305.80-5 (1988)).[6]

Section 2112(a)(5) requires all courts in which proceedings are instituted, other than the court in which the record is filed, to transfer those proceedings to the court in which the record is filed. The section nonetheless authorizes the court in which the record is filed to transfer all proceedings to any other court of appeals for the convenience of the parties and in the interest of justice.

Bibliography:

I. Legislative History

1. See Chapter 1 on Administrative Procedure Act.

2. House of Representatives Committee on the Judiciary, *Report to Accompany H.R. 1162*, H.R. Rep. No. 100-72, 100th Cong., 1st Sess. (1987).

3. Senate Comm. on the Judiciary, *Report to Accompany S. 1134*, S. Rep. No. 100-263, 100th Cong., 1st Sess. (1987).

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[6] See generally McGarity, *Multi-Party Forum Shopping for Appellate Review of Administrative Action*, Report to the Administrative Conference of the U.S., 129 U. Pa. L. Rev. 302 (1980); 1980 ACUS 437.

Appendix:

1. 5 U.S.C. §§701-706 (See Chapter 1 Appendix).
2. 28 U.S.C. §§1331; 2112; 2341-51 (1988).

Judicial Review of Agency Action

Title 28, U.S. Code

§1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.
(June 25, 1948, ch. 646, 62 Stat. 930; July 25, 1958, Pub. L. No. 85-554, §1, 72 Stat. 415; Oct. 21, 1976, Pub. L. No. 94-574, §2, 90 Stat. 2721; Dec. 1, 1980, Pub. L. No. 96-486, §2(a), 94 Stat. 2369.)

Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., §41(1) (Mar. 3, 1911, ch. 231, §24, par. 1, 36 Stat. 1091; May 14, 1934, ch. 283, §1, 48 Stat. 775; Aug. 21, 1937, ch. 726, §1, 50 Stat. 738; Apr. 20, 1940, ch. 117, 54 Stat. 143).

Jurisdiction of federal questions arising under other sections of this chapter is not dependent upon the amount in controversy. (See annotations under former section 41 of title 28, U.S.C.A., and 35 C.J.S., p. 833 et seq., §§30-43. See, also, reviser's note under section 1332 of this title.)

Words "wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs," were added to conform to rulings of the Supreme Court. See construction of provision relating to jurisdictional amount requirement in cases involving a Federal question in United States v. Sayward, 16 S.Ct. 371, 160 U.S. 493, 40 L.Ed. 508; Fishback v. Western Union Tel. Co., 16 S.Ct. 506, 161 U.S. 96, 40 L.Ed. 630; and Halt v. Indiana Manufacturing Co., 1900, 20 S.Ct. 272, 176 U.S. 68, 44 L.Ed. 374.

Words "all civil actions" were substituted for "all suits of a civil nature, at common law or in equity" to conform with Rule 2 of the Federal Rules of Civil Procedure.

Words "or treaties" were substituted for "or treaties made, or which shall be made under their authority," for purposes of brevity.

The remaining provisions of section 41(1) of title 28, U.S.C., 1940 ed., are incorporated in sections 1332, 1341, 1342, 1345, 1354, and 1359 of this title.

Changes were made in arrangement and phraseology.

Amendments

1980 Pub. L. No. 96-486 struck out "; amount in controversy; costs" in section catchline, struck out minimum amount in controversy requirement of $10,000 for original jurisdiction in federal question cases which necessitated striking the exception to such required minimum amount that authorized original jurisdiction in actions brought against the United States, any agency thereof, or any officer or employee thereof in an official capacity, struck out provision authorizing the district court except where express provision therefore was made in a federal statute to deny costs to a plaintiff and in fact impose such costs upon such plaintiff where plaintiff was adjudged to be entitled to recover less than the required amount in controversy, computed without regard to set-off or counterclaim and exclusive of interests and costs, and struck out existing subsection designations.

1976 Subsec. (a). Pub. L. No. 94-574 struck out $10,000 jurisdictional amount where action is brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

1958 Pub. L. No. 85-554 included costs in section catchline, designated existing provisions as subsec. (a), substituted "$10,000" for "$3,000", and added subsec. (b).

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1441 of this title; title 15 section 2064; title 25 section 416a; title 42 section 405.

§2112. Record on review and enforcement of agency orders

(a) The rules prescribed under the authority of section 2072 of this title may provide for the time and manner of filing and the contents of the record in all proceedings instituted in the courts of appeals to enjoin, set aside, suspend, modify, or otherwise review or enforce orders of administrative agencies, boards, commissions, and officers. Such rules may authorize the agency, board, commission, or officer to file in the court a certified list of the materials comprising the record and retain and hold for the court all such materials and transmit the same or any part thereof to the court, when and as required by it, at any time prior to the final determination of the proceeding, and such filing of such certified list of the materials comprising the record and such subsequent transmittal of any such materials when and as required shall be deemed full compliance with any provision of law requiring the filing of the record in the court. The record in such proceedings shall be certified and filed in or held for and transmitted to the court of appeals by the agency, board, commission, or officer concerned within the time and in the manner prescribed by such rules. If proceedings are instituted in two or more courts of appeals with respect to the same order, the following shall apply:

(1) If within ten days after issuance of the order the agency, board, commission, or officer concerned receives, from the persons instituting the proceedings, the petition for review with respect to proceedings in at least two courts of appeals, the agency, board, commission, or officer shall proceed in accordance with paragraph (3) of this subsection. If within ten days after the issuance of the order the agency, board, commission, or officer concerned receives, from the persons instituting the proceedings, the petition for review with respect to proceedings in only one court of appeals, the agency, board, commission, or officer shall file the record in that court notwithstanding the institution in any other court of appeals of proceedings for review of that order. In all other cases in which proceedings have been instituted in two or more courts of appeals with respect to the same order, the agency, board, commission, or officer concerned shall file the record in the court in which proceedings with respect to the order were first instituted.

(2) For purposes of paragraph (1) of this subsection, a copy of the petition or other pleading which institutes proceedings in a court of appeals and which is

stamped by the court with the date of filing shall constitute the petition for review. Each agency, board, commission, or officer, as the case may be, shall designate by rule the office and the officer who must receive petitions for review under paragraph (1).

(3) If an agency, board, commission, or officer receives two or more petitions for review of an order in accordance with the first sentence of paragraph (1) of this subsection, the agency, board, commission, or officer shall, promptly after the expiration of the ten-day period specified in that sentence, so notify the judicial panel on multidistrict litigation authorized by section 1407 of this title, in such form as that panel shall prescribe. The judicial panel on multidistrict litigation shall, by means of random selection, designate one court of appeals, from among the courts of appeals in which petitions for review have been filed and received within the ten-day period specified in the first sentence of paragraph (1), in which the record is to be filed, and shall issue an order consolidating the petitions for review in that court of appeals. The judicial panel on multidistrict litigation shall, after providing notice to the public and an opportunity for the submission of comments, prescribe rules with respect to the consolidation of proceedings under this paragraph. The agency, board, commission, or officer concerned shall file the record in the court of appeals designated pursuant to this paragraph.

(4) Any court of appeals in which proceedings with respect to an order of an agency, board, commission, or officer have been instituted may, to the extent authorized by law, stay the effective date of the order. Any such stay may thereafter be modified, revoked, or extended by a court of appeals designated pursuant to paragraph (3) with respect to that order or by any other court of appeals to which the proceedings are transferred.

(5) All courts in which proceedings are instituted with respect to the same order, other than the court in which the record is filed pursuant to this subsection, shall transfer those proceedings to the court in which the record is so filed. For the convenience of the parties in the interest of justice, the court in which the record is filed may thereafter transfer all the proceedings with respect to that order to any other court of appeals.

(b) The record to be filed in the court of appeals in such a proceeding shall consist of the order sought to be reviewed or enforced, the findings or report upon which it is based, and the pleadings, evidence, and proceedings before the agency, board, commission, or officer concerned, or such portions thereof (1) as the rules prescribed under the authority of section 2072 of this title may require to be included therein, or (2) as the agency, board, commission, or officer concerned, the petitioner for review or respondent in enforcement, as the case may be, and any intervenor in the court proceeding by written stipulation filed with the agency, board, commission, or officer concerned or in the court in any such proceeding may consistently with the rules prescribed under the authority of section 2072 of this title designate to be included therein, or (3) as the court upon motion of a party or, after a prehearing conference, upon its own motion may by order in any such proceeding designate to be included therein. Such a stipulation or order may provide in an appropriate case that no record need be filed in the court of appeals. If, however, the correctness of a finding of fact by the agency, board, commission, or officer is in question all of the evidence before the agency, board, commission, or officer shall be included in the record except such as the agency, board, commission, or officer concerned, the petitioner for review or respondent in enforcement, as the case may be, and any intervenor in the court proceeding by written stipulation filed with the agency, board, commission, or officer concerned or in the court agree to omit as wholly immaterial to the questioned finding. If there is omitted from the record any portion of the proceedings before the agency, board, commission, or officer which the court subsequently determines to be proper for it to consider to enable it to review or enforce the order in question the court may direct that such additional portion of the proceedings be filed as a supplement to the record. The agency, board, commission, or officer concerned may, at its option and without regard to the foregoing provisions of this subsection, and if so requested by the petitioner for review or respondent in enforcement shall, file in the court the entire record of the proceedings before it without abbreviation.

(c) The agency, board, commission, or officer concerned may transmit to the court of appeals the original papers comprising the whole or any part of the record or any supplemental record, otherwise true copies of such papers certified by an authorized officer or deputy of the agency, board, commission, or officer concerned shall be transmitted. Any original papers thus transmitted to the court of appeals shall be returned to the agency, board, commission, or officer concerned upon the final determination of the review or enforcement proceeding. Pending such final determination any such papers may be returned by the court temporarily to the custody of the agency, board, commission, or officer concerned if needed for the transaction of the public business. Certified copies of any papers included in the record or any supplemental record may also be returned to the agency, board, commission, or officer concerned upon the final determination of review or enforcement proceedings.

(d) The provisions of this section are not applicable to proceedings to review decisions of the Tax Court of the United States or to proceedings to review or enforce those orders of administrative agencies, boards, commissions, or officers which are by law reviewable or enforceable by the district courts.

(Added Pub. L. No. 85-791, §2, Aug. 28, 1958, 72 Stat. 941, and amended Pub. L. No. 89-773, §5(a), (b), Nov. 6, 1966, 80 Stat. 1323; Pub. L. No. 100-236, §1, Jan. 8, 1988, 101 Stat. 1731.)

AMENDMENTS

1988 Subsec. (a). Pub. L. No. 100-236 substituted "If proceedings are instituted in two or more courts of appeals with respect to the same order, the following shall apply:" and pars. (1) to (5) for "If proceedings have been instituted in two or more courts of appeals with respect to the same order the agency, board, commission, or officer concerned shall file the record in that one of such courts in which a proceeding with respect to such order was first instituted. The other courts in which such proceedings are pending shall thereupon transfer them to the court of appeals in which the record has been filed. For the convenience of the parties in the interest of justice such court may thereafter transfer all the proceedings with respect to such order to any other court of appeals."

1966 Subsec. (a). Pub. L. No. 89-773, §5(a), substituted "The rules prescribed under the authority of section 2072 of this title may provide for the time and manner of filing" for "The several courts of appeal shall have power to adopt, with the approval of the Judicial Conference of the United States, rules, which so far as practicable shall be uniform in all such courts prescribing the time and manner of filing." See section 2072 of this title.

Subsec. (b). Pub. L. No. 89-773, §5(b), substituted "the rules prescribed under the authority of section 2072 of this title" for "the said rules of the court of appeals" and for "the rules of such court".

§2341. Definitions

As used in this chapter-

(1) "clerk" means the clerk of the court in which the petition for the review of an order, reviewable under this chapter, is filed;

(2) "petitioner" means the party or parties by whom a petition to review an order, reviewable under this chapter, is filed; and

(3) "agency" means-

(A) the Commission, when the order sought to be reviewed was entered by the Federal Communications Commission, the Federal Maritime Commission, the Interstate Commerce Commission, or the Atomic Energy Commission, as the case may be;

(B) the Secretary, when the order was entered by the Secretary of Agriculture;

(C) the Administration, when the order was entered by the Maritime Administration; and

(D) the Secretary, when the order is under section 812 of the Fair Housing Act.

(Added Pub. L. No. 89-554, §4(e), Sept. 6, 1966, 80 Stat. 622, and amended Pub. L. No. 93-584, §3, Jan. 2, 1975, 88 Stat. 1917; Pub. L. No. 100-430, §11(b), Sept. 13, 1988, 102 Stat. 1635.)

§2342. Jurisdiction of court of appeals

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of-

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

(2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;

(3) all rules, regulations, or final orders of--

(A) the Secretary of Transportation issued pursuant to section 2, 9, 37, 41, or 43 of the Shipping Act, 1916 (46 U.S.C. App. 802, 803, 808, 835, 839, and 841a); and

(B) the Federal Maritime Commission issued pursuant to--

(i) section 23, 25, or 43 of the Shipping Act, 1916 (46 U.S.C. App. 822, 824, or 841a);

(ii) section 19 of the Merchant Marine Act, 1920 (46 U.S.C. App. 876);

(iii) section 2, 3, 4, or 5 of the Intercoastal Shipping Act, 1933 (46 U.S.C. App. 844, 845, 845a, or 845b);

(iv) section 14 or 17 of the Shipping Act of 1984 (46 U.S.C. App. 1713 or 1716); or

(v) section 2(d) or 3(d) of the Act of November 6, 1966 (46 U.S.C. App. 817d(d) or 817e(d);

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42;

(5) all rules, regulations, or final orders of the Interstate Commerce Commission made reviewable by section 2321 of this title and all final orders of such Commission made reviewable under section 11901(j)(2) of title 49, United States Code; and

(6) all final orders under section 812 of the Fair Housing Act.

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

(Added Pub. L. No. 89-554, §4(e), Sept. 6, 1966, 80 Stat. 622, and amended Pub. L. No. 93-584, §4, Jan. 2, 1975, 88 Stat. 1917; Pub. L. No. 95-454, title II, §206, Oct. 13, 1978, 92 Stat. 1144; Pub. L. No. 96-454, §8(b)(2), Oct. 15, 1980, 94 Stat. 2021; Pub. L. No. 97-164, title I, §137, Apr. 2, 1982, 96 Stat. 41; Pub. L. No. 98-554, title II, §227(a)(4), Oct. 30, 1984, 98 Stat. 2852; Pub. L. No. 99-336, §5(a), June 19, 1986, 100 Stat. 638; Pub. L. No. 100-430, §11(a), Sept. 13, 1988, 102 Stat. 1635.)

§2343. Venue

The venue of a proceeding under this chapter is in the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit.

(Added Pub. L. No. 89-554, §4(e), Sept. 6, 1966, 80 Stat. 622.)

§2344. Review of orders; time; notice; contents of petition; service

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. The petition shall contain a concise statement of-

(1) the nature of the proceedings as to which review is sought;

(2) the facts on which venue is based;

(3) the grounds on which relief sought; and

(4) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt.

(Added Pub. L. No. 89-554, §4(e), Sept. 6, 1966, 80 Stat. 622.)

§2345. Prehearing conference

The court of appeals may hold a prehearing conference or direct a judge of the court to hold a prehearing conference.
(Added Pub. L. No. 89-554, §4(e), Sept. 6, 1966, 80 Stat. 622.)

§2346. Certification of record on review

Unless the proceeding has been terminated on a motion to dismiss the petition, the agency shall file in the office of the clerk the record on review as provided by section 2112 of this title.
(Added Pub. L. No. 89-554, §4(e), Sept. 6, 1966, 80 Stat. 623.)

§2347. Petitions to review; proceedings

(a) Unless determined on a motion to dismiss, petitions to review orders reviewable under this chapter are heard in the court of appeals on the record of the pleadings, evidence adduced and proceedings before the agency, when the agency has held a hearing whether or not required to do so by law.

(b) When the agency has not held a hearing before taking the action of which review is sought by the petition, the court of appeals shall determine whether a hearing is required by law. After that determination, the court shall-

(1) remand the proceedings to the agency to hold a hearing, when a hearing is required by law;

(2) pass on the issues presented, when a hearing is not required by law and it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or

(3) transfer the proceedings to a district court for the district in which the petitioner resides or has its principal office for a hearing and determination as if the proceedings were originally initiated in the district court, when a hearing is not required by law and a genuine issue of material fact is presented. The procedure in these cases in the district court is governed by the Federal Rules of Civil Procedure.

(c) If a party to a proceeding to review applies to the court of appeals in which the proceeding is pending for leave to adduce additional evidence and shows to the satisfaction of the court that-

(1) the additional evidence is material; and

(2) there were reasonable grounds for failure to adduce the evidence before the agency;

the court may order the additional evidence and any counterevidence the opposite party desires to offer to be taken by the agency. The agency may modify its findings of fact, or make new findings, by reason of the additional evidence so taken, and may modify or set aside its order, and shall file in the court the additional evidence, the modified findings or new findings, and the modified order or the order setting aside the original order.
(Added Pub. L. No. 89-554, §4(e), Sept. 6, 1966, 80 Stat. 623.)

§2348. Representation in proceeding; intervention

The Attorney General is responsible for and has control of the interests of the Government in all court proceedings under this chapter. The agency, and any party in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside, or suspended, may appear as parties thereto of their own motion and as of right, and be represented by counsel in any proceeding to review the order. Communities, associations, corporations, firms, and individuals, whose interests are affected by the order of the agency, may intervene in any proceeding to review the order. The Attorney General may not dispose of or discontinue the proceeding to review over the objection of any party or intervenor, but any intervenor may prosecute, defend, or continue the proceeding unaffected by the action or inaction of the Attorney General.
(Added Pub. L. No. 89-554, §4(e), Sept. 6, 1966, 80 Stat. 623.)

§2349. Jurisdiction of the proceeding

(a) The court of appeals has jurisdiction of the proceeding on the filing and service of a petition to review. The court of appeals in which the record on review is filed, on the filing, has jurisdiction to vacate stay orders or interlocutory injunctions previously granted by any court, and has exclusive jurisdiction to make and enter, on the petition, evidence, and proceedings set forth in the record on review, a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency.

(b) The filing of the petition to review does not of itself stay or suspend the operation of the order of the agency, but the court of appeals in its discretion may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the petition. When the petitioner makes application for an interlocutory injunction restraining or suspending the enforcement, operation, or execution of, or setting aside, in whole or in part, any order reviewable under this chapter, at least 5 days' notice of the hearing thereon shall be given to the agency and to the Attorney General. In a case in which irreparable damage would otherwise result to the petitioner, the court of appeals may, on hearing, after reasonable notice to the agency and to the Attorney General, order a temporary stay or suspension, in whole or in part, of the operation of the order of the agency for not more than 60 days from the date of the order pending the hearing on the application for the interlocutory injunction, in which case the order of the court of appeals shall contain a specific finding, based on evidence submitted to the court of appeals, and identified by reference thereto, that irreparable damage would result to the petitioner and specifying the nature of the damage. The court of appeals, at the time of hearing the application for an interlocutory injunction, on a like finding, may continue the temporary stay or suspension, in whole or in part, until decision on the application.
(Added Pub. L. No. 89-554, §4(e), Sept. 6, 1966, 80 Stat. 624, and amended Pub. L. No. 98-620, title IV, §402(29)(F), Nov. 8, 1984, 98 Stat. 3359.)

§2350. Review in Supreme Court on certiorari or certification

(a) An order granting or denying an interlocutory injunction under section 2349(b) of this title and a final judgment of the court of appeals in a proceeding to review under this chapter are subject to review by the Supreme Court on a writ of certiorari as provided by section 1254(1) of this title. Application for the writ shall be made within 45 days after entry of the order and within 90 days after entry of the judgment, as the case may be. The United States, the agency, or an aggrieved party may file a petition for a writ of certiorari.

(b) The provisions of section 1254(2) of this title, regarding certification, and of section 2101(f) of this title, regarding stays, also apply to proceedings under this chapter.

(Added Pub. L. No. 89-554, §4(e), Sept. 6, 1966, 80 Stat. 624, and amended Pub. L. No. 100-352, §5(e), June 27, 1988, 102 Stat. 663.)

§2351. Enforcement of orders by district courts

The several district courts have jurisdiction specifically to enforce, and to enjoin and restrain any person from violating any order issued under section 193 of title 7.

(Added Pub. L. No. 89-554, §4(e), Sept. 6, 1966, 80 Stat. 624.)

[§2352. Repealed. Pub. L. No. 89-773, §4, Nov. 6, 1966, 80 Stat. 1323]

Section, Pub. L. No. 89-554, §4(e), Sept. 6, 1966, 80 Stat. 624, directed the several courts of appeals to adopt and promulgate rules, subject to the approval of the Judicial Conference of the United States, governing the practice and procedure, including prehearing conference procedure, in proceedings to review orders under this chapter. See section 2072 of this title.

Savings Provision

Section 4 of Pub. L. No. 89-773 provided in part that the repeal of this section shall not operate to invalidate or repeal rules adopted under the authority of this section prior to the enactment of Pub. L. No. 89-773, which rules shall remain in effect until superseded by rules prescribed under authority of section 2072 of this title as amended by Pub. L. No. 89-773.

[§2353. Repealed. Pub. L. No. 97-164, title I, §138, Apr. 2, 1982, 96 Stat. 42]

Section, added Pub. L. No. 91-577, title III, §143(c), Dec. 24, 1970, 84 Stat. 1559, gave the court of appeals nonexclusive jurisdiction to hear appeals under section 71 of the Plant Variety Protection Act (7 U.S.C. 2461). See section 1295(a)(8) of this title.

Administrative Dispute Resolution Act

Citations:

5 U.S.C. §§581-593[1] (general provisions, confidentiality, administrative arbitration); 5 U.S.C. §556(c) (ALJ authority); 9 U.S.C. §10 (arbitration, judicial review); 41 U.S.C. §§604-607 (contract disputes); 29 U.S.C. §173 (FMCS authority); 28 U.S.C. §2672 (tort claims); and 31 U.S.C. §3711(a)(2) (government claims); enacted November 15, 1990 by Pub. L. No. 101-552, 104 Stat. 2736.

Lead Agency:

Administrative Conference of the United States, 2120 L Street NW, Suite 500, Washington, DC 20037 (202) 254-7020.

Overview:

Background. The Administrative Dispute Resolution Act establishes a statutory framework for federal agency use of ADR in accordance with reforms advocated by the Conference in numerous recommendations. Alternative means of dispute resolution have been used increasingly by states, courts and private entities in the past decade or so. Their value lies in enabling parties to bring to bear their experience, to foster creative, acceptable solutions, and to produce expeditious decisions requiring fewer resources than formal litigation. Mediation, arbitration, minitrials, factfinding, early neutral evaluation, settlement judges, and similar methods have begun to prove increasingly useful in resolving administrative disputes.

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[1] The Negotiated Rulemaking Act of 1990 (see Chapter 14), Pub. L. No. 101-648, also contains sections in title 5 of the U.S. Code numbered 581-590. H.R. 2549 (see Appendix) would remedy this situation. Congress had approved the amendments as of mid-August, 1992; presidential signature was expected. The pre-amendment section numbers are used herein.

There is general recognition in the federal government and the private bar that litigation and formal hearing processes are too costly, time consuming, and destructive of a cooperative government-private sector relationship. Yet for the past 30 years, formality has been the trend in federal administrative law. This trend in more costly "process" has been concurrent with the growth in federal laws, budgets, regulations, judges, lawyers and all the other factors that tend to result in more (and more costly) disputes.

Seeking to counter this trend for more than a dozen years, the Conference has repeatedly encouraged federal agency use of ADR processes, based on the experiences of the Environmental Protection Agency, the U.S. Army Corps of Engineers, and a few other federal agencies that have successfully used these methods. Even so, progress has been slow.

It became evident to many practitioners and experts that legislation was needed to resolve legal questions and to prompt agencies. The Act was the response. It authorizes and encourages all federal agencies to use consensual processes, including arbitration, to enhance the possibility of reaching agreements expeditiously within the confines of agency authority. It is premised on Congress' findings that ADR can lead to more creative, efficient, stable, and sensible outcomes.

Agency Implementation. Section 3 of the Administrative Dispute Resolution Act provides for agency action to put the provisions of this new legislation into effect. The Act provides for a responsible review process for agencies to follow. In this process, the agency will consider whether, and under what circumstances, ADR techniques may benefit the public and help it to fulfill statutory duties more effectively.

An agency is required to consider--in consultation with the Conference--if ADR can be useful to each of its "administrative programs." Section 581 of this new subchapter defines an agency's "administrative program" broadly to include all activities involving "protection of the public interest and the determination of rights. . . ." Agency review is directed to all manner of agency actions including actions involving entitlement programs, grants, contracts, insurance, loans, guarantees, licensing, inspections, taxes, fees, enforcement, postal services, economic regulation, management, claims, or private party complaints. Following review of its administrative programs, an agency will adopt policies on use of ADR. Section 582(b) lists factors an agency should use to determine if the dispute the agency has identified lends itself to ADR, especially binding arbitration.

Section 3 assigns responsibility to implement the provisions of the Act. Each agency head is expected to designate a senior official to be the dispute resolution specialist of the agency. This official generally works at a departmental or comparable level to oversee the implementation of ADR activities and development of the agency policy on ADR. Ideally, the specialist or a designee would also seek to interact with counsel and program officers in helping these colleagues make full and effective use of the wide range of available dispute resolution options and in keeping them apprised of relevant developments in the public and private sectors. Each agency is expected to make training available to its specialist and other employees involved in implementing the Act. The agency specialist is expected to recommend to the agency head a list of other agency employees for similar training to be conducted by the specialist within the agency. The legislation designates the Conference to offer agencies policy and technical assistance and to report to Congress on agency progress.

Section 3(d)(1) provides that each agency with significant grant or contract functions review its standard contract or assistance agreements to determine if a need exists for amendments to those agreements to authorize or encourage ADR use. Section 3(d)(2) provides that the Federal Acquisition Regulation be amended to reflect the amendments made by the Act.

ADR Methods. *Arbitration.* Arbitration is closely akin to adjudication in that a neutral third party decides the submitted issue after reviewing evidence and hearing argument from the parties. It may be binding on the parties either through agreement or operation of law, or it may be nonbinding in that the decision is only advisory. Arbitration may be voluntary, where the parties agree to resolve the issues by means of arbitration, or it may be mandatory, where the process is the exclusive means provided. Under the Act, it must always be voluntary.

Minitrial. A minitrial is a structured settlement process in which each side presents a highly abbreviated summary of its case before senior officials of each party authorized to settle the case. A neutral adviser sometimes presides over the proceeding and will render an advisory opinion if asked to do so. Following the presentations, the officials seek to negotiate a settlement.

Mediation. Mediation involves a neutral third party trained to assist the parties in negotiating an agreement. The mediator has no independent authority and does not render a decision; any decision must be reached by the parties themselves.

Facilitating. Facilitating helps parties reach a decision or a satisfactory resolution of the matter to be addressed. While often used interchangeably with "mediator," a facilitator generally conducts meetings and coordinates discussions, but does not become as involved in the substantive issues as does a mediator.

Convening or Conflict Assessment. Convening helps identify issues in controversy and affected interests. The convenor is generally called upon to determine whether direct negotiations among the parties would be a suitable means of resolving the issues, and if so to bring the parties together for that purpose. Convening has proved valuable in negotiated rulemaking and environmental disputes.

Negotiation. Negotiation is simply communication among people or parties in an effort to reach an agreement. It is used so routinely that it is frequently overlooked as a specific means of resolving disputes. In the administrative context, it means procedures and processes for settling matters that would otherwise be resolved by more formal means.

Negotiated Rulemaking. This is a formal process initiated by an agency promulgating a regulation. If a convenor recommends negotiation, neutral-led discussions including interested parties can effect an acceptable solution. It is used when an agency issues or revises a rule, especially when controversy is expected. The result is a proposed rule.

Summary Jury Trial. Disputants present evidence at a brief mock trial with a mock jury. After an advisory verdict, the presiding official may assist disputants negotiate.

Neutral Evaluation/Factfinding. Unbiased input on technical aspects of a dispute is provided by a subject matter specialist. These methods are apt where parties are willing to share pertinent data, desire perspective on strengths and weaknesses, or want prompt resolution by real decisionmakers. Following the findings, the parties may then negotiate a settlement, hold further proceedings, or conduct more research or discovery.

Settlement Judge. This process involves mediation or discussions by disputants before a neutral, generally a judge other than the presiding one. It is generally voluntary. The settlement judge may give an informal advisory opinion.

ADR Authority. The Act, section 582(a), authorizes agencies to use any ADR method to resolve any controversy relating to an administrative program. The term "alternative means of dispute resolution" is a key term used in the legislation and is defined in section 581(3) as follows:

> "Alternative means of dispute resolution" means any procedure that is used in lieu of an adjudication as defined in section 551(7) of this title, to resolve issues in controversy, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, or any combination thereof.

Section 551(7) of title 5 further defines "adjudication" to include "agency process for the formulation of an order;" and an "order" under section 551(6) is the "final disposition . . . of an agency in a matter other than rule making. . . ." Thus, "order" and "rule" encompass almost everything agencies do. Consequently, the term "alternative means of dispute resolution," when used in the body of the legislation, can broadly include any procedure an agency may use to resolve any issue in controversy in any federal program activity. "Issue in controversy" and "administrative program" (Sections 581(8) and (2))[2] are similarly inclusive.

The Act explicitly gives agencies broad discretion as to when and how to use ADR methods. Agency decisions on using or not using ADR are unreviewable (Section 591(b)(1)). The sole exception allows any nonparty adversely affected by an arbitral award to seek review of an agency decision to arbitrate under the Act. In such an action, the district court would decide whether the agency's decision to use arbitration was clearly inconsistent with section 582(b)'s criteria for appropriate use of ADR.

Under 582(b), agencies should "consider not using" ADR when:

> (1) a definitive or authoritative resolution of the matter is required for precedential value, and such

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[2] Cases relating to certain federal employee grievances are exempted from the Act. H.R. 2549 (see Appendix) would expand "issue in controversy," which was limited in the original to disputes in which the agency is a party. The employee grievance exemption would remain unchanged.

> a proceeding is not likely to be accepted generally as an authoritative precedent;
>
> (2) the matter involves or may bear upon significant questions of Government policy that require additional procedures before a final resolution may be made, and such a proceeding would not likely serve to develop a recommended policy for the agency;
>
> (3) maintaining established policies is of special importance, so that variations among individual decisions are not increased and such a proceeding would not likely reach consistent results among individual decisions;
>
> (4) the matter significantly affects persons or organizations who are not parties to the proceeding;
>
> (5) a full public record of the proceeding is important, and a dispute resolution proceeding cannot provide such a record; and
>
> (6) the agency must maintain continuing jurisdiction over the matter with authority to alter the disposition of the matter in the light of changed circumstances, and a dispute resolution proceeding would interfere with the agency's fulfilling that requirement.

This does not simply mean that the agency should not use ADR in a case involving public policy. A subtler balancing will be needed. For instance, in many such cases mediation, negotiated rulemaking, and similar methods will be very useful. On the other hand, agencies should not ordinarily use an arbitration to decide a major policy issue. This approach was intended to afford agencies maximum discretion, reinforced by the general nonreviewability of almost all decisions on use of ADR. Note that the provision does not state that the agency "shall not consider" and that the conjunctive "and" is employed in section 582(b). In exercising their very broad discretion, agencies should take into account all factors and qualifiers as to when, and what kind, of ADR methods to use. In no case need a formal finding or justification accompany an agency decision on employing ADR.

Administrative Arbitration. One ADR process--binding arbitration--has evoked significant controversy in the public sector. After Congress passed the U.S. Arbitration Act in 1925, binding arbitration in private sector disputes became a widely accepted alternative to litigation. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), and several other recent Supreme Court decisions have been extremely encouraging to arbitration. Since early in this century, however, the Comptroller General took the view that unless a federal agency had explicit statutory authorization, it was prohibited from using a private arbitrator to decide the validity of virtually any claim involving the government.[3] This Act underscores the growing modern acceptance of arbitration by reversing this presumption.

Section 4, amending 5 U.S.C. §§585-591, authorizes parties to administrative proceedings, including agencies, to agree to binding arbitration, but provides that the arbitral award does not become final and binding on an agency party for 30 days. During the interim, the agency head has unreviewable authority to vacate the arbitral award. In such cases the agency would assume all attorneys fees and expenses of the arbitration process unless an adjudicative officer or other designated official of the agency finds that the award of expenses is unjust. After 30 days, the award would become final and enforceable on the agency, as on other parties. The Act recognizes that certain kinds of government decisions will not be suitable for arbitration and in Section 582(b) helps agencies and reviewing courts by delineating factors to consider.

The Act stipulates, in Section 589, that the arbitrator shall set a time and place for the hearing and that an arbitration proceeding shall be conducted expeditiously and in an informal manner. The parties may present evidence and cross-examine witnesses, but the arbitrator may exclude evidence that is irrelevant, immaterial, unduly repetitious, or privileged. The arbitrator may interpret and apply relevant statutory and regulatory requirements, legal precedents, and policy directives. The arbitrator shall make the award within 30 days of the hearing unless the parties agree to some other time limit or are bound by a rule providing otherwise.

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[3] See Berg, "Legal and Structural Obstacles to the Use of ADR in Federal Programs," in Administrative Conference of the U.S., *Agency Arbitration* (1987).

Arbitral awards generally have no precedential value, and are subject to review under the U.S. Arbitration Act.

Confidentiality. Section 4, 5 U.S.C. §584, fosters agency use of ADR by ensuring appropriate protection of parties' and neutrals' communications. In doing so, the Act seeks a balance between the openness required for legitimacy and the confidentiality that is critical if many sensitive negotiations are to yield agreements.

The legislation intends to provide a definite measure of confidentiality for neutrals and parties. In addition to Conference Recommendation 88-11, *Encouraging Settlements by Protecting Mediator Confidentiality*, three other sources are particularly important in determining the Act's approach to confidentiality. These are the Federal Rules of Evidence, the Federal Rules of Civil Procedure, and the Freedom of Information Act. Each of these offers limited and, at times, contradictory protection to parties and neutrals in settlement negotiations. The protections of section 584 are consistent with case law under those authorities, but are clearer and surer in their application.

Section 584 generally prohibits disclosure of most settlement communications. Protected communications include the verbal exchange of information among the parties or in caucus between a party and the neutral facilitator. They also include a "settlement document," which is any written material that is provided in confidence to or generated by the neutral or generated by the parties for the purpose of a settlement proceeding, including memoranda, notes, and work product. Section 584 covers documents that are created specifically for the negotiations and that are furnished in confidence to the neutral by a participant in the negotiation.

Section 584(a)(4) has a few narrow, clearly stated exceptions to confidentiality, most notably for information that could prevent harm to the public health and welfare, prevent a manifest injustice, or reveal a violation of law. Disclosure or testimony can in those situations be ordered when the court finds the magnitude in a particular case sufficient to outweigh the integrity of dispute resolution, in general. The mere issuance of a subpoena would not be sufficient.

Section 584(j) provides that the Act is not a statute specifically exempting disclosure under section 552(b)(3) of the Freedom of

Information Act.[4] This last minute legislative change may give rise to some uncertainty. It clearly will not pose problems for contractors or other private persons who serve as neutrals; case law makes clear the immunity of such persons' papers under FOIA. Potential questions could arise, though, as to documents possessed by government employees who mediate cases involving their own or other agencies. If FOIA applies, then some might claim access to settlement documents retained by the government mediator. Because of this uncertainty, some government mediators report that they routinely trash all notes and other settlement documents at the close of discussions. There is some question as to whether such documents are government records, and some case law supports immunity from disclosure for government mediators. Of course, documents submitted in confidence with proprietary business information would be exempt. As to the rest, the Conference has recommended that agencies interpret FOIA to avoid disclosure of all settlement communications by neutrals serving in administrative dispute resolution proceedings. In sum, while the protections to confidentiality of government mediators should be quite firm, especially if agencies take precautions, no court has yet ruled on these kinds of questions.

Neutrals who are requested to disclose protected documents must make an effort to notify the parties of demands for disclosure, and a party that does not offer to defend a neutral's refusal to disclose is considered to have waived any objection. The Act gives parties authority to vary the confidentiality provisions if all parties and the neutral agree to alternate provisions in advance.

Neutrals. Section 4, adding 5 U.S.C. §583, provides that an arbitrator, mediator, convenor, facilitator, settlement judge, or other ADR neutral may be an employee of the federal government or any other person acceptable to both parties. Section 583 authorizes the Conference to develop standards for neutrals and provides for the maintenance of a roster of neutrals. Services of a neutral may be obtained by such methods as interagency agreements, purchase orders, contracts, basic ordering agreements, and under some circumstances, via requirements contracts.

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[4] Applicability of FOIA arose at the last minute and was not fully resolved. In a floor colloquy at the time of the Act's Senate passage, Senators Grassley and Levin expressed concern that the Act's current provisions do not adequately protect settlement communications. Senator Leahy, who chaired the Judiciary Subcommittee with jurisdiction over FOIA, pledged "to the sponsor of the bill, Senator Grassley, . . . to work with him next year on this issue and try to determine whether certain dispute resolution communications should be exempt from FOIA." 136 Cong. Rec. S 18088 (daily ed. Oct. 24, 1990).

Amendments to Existing Legislation. The Administrative Dispute Resolution Act was crafted to be "built into" existing agency processes. Specifically amended statutes include:

- Section 4, which amends the primary law governing federal agency administrative actions, the Administrative Procedure Act. The Act endeavors, through the APA amendments, to achieve its goals without disruption to any existing authority or dispute resolution system. Section 4 authorizes agencies and parties to administrative proceedings to use neutrals, including mediators, facilitators, and arbitrators. The Act authorizes agencies to use the full range of alternative means of dispute resolution for their programs. The Act removes any doubt an agency official may have had about the authority to use ADR techniques, and expands arbitration authority. The only conditions are that the agreement to use an ADR technique be voluntary and--in the case of arbitration--not inappropriate under the standards set forth in section 582(b).

- Section 6, which amends 41 U.S.C. §§604-607, the Contract Disputes Act, to make it clear that government contracting officers and boards of contract appeals are encouraged to resolve claims by ADR and have the authority to do so. This includes the new authority to make use of arbitration in appropriate cases. Judicial review is available as in existing law. The amendments to the Contract Disputes Act are supplemental to existing arbitration authority in a few agencies.

- Section 7, which amends section 203 of the Labor Management Relations Act to authorize the Federal Mediation and Conciliation Service to make its mediators' and trainers' services available to other federal agencies.

- Section 8, which amends the Federal Tort Claims Act (28 U.S.C. §2672) to grant the

Attorney General the authority to delegate additional tort claim compromise or settlement authority to agency heads without the necessity of prior Attorney General approval. Such delegations have been fixed at $25,000 for almost all agencies since 1966 (see Chapter 10). They now can be raised as high as, but cannot exceed, the dollar amount of delegated approval authority given to United States attorneys to settle claims against the United States (at present $500,000).

- Section 9, which also amends 31 U.S.C. §3711(a)(2) to raise agency claim compromise authority without prior Attorney General approval from $20,000 to $100,000 or even higher at the direction of the Attorney General.

Legislative History:

The Act reflects numerous Conference recommendations (see Bibliography). Recommendation 86-3, *Agencies' Use of Alternative Means of Dispute Resolution*, 1 CFR §305.86-3 (1992), urged Congress to authorize agencies to use ADR processes, including arbitration, to resolve matters that would otherwise be decided formally. The recommendation also set out other features that became part of the final legislation, including the criteria for appropriate use of ADR, judicial review, enforcement standards, and suggestions related to the general nature of congressional action designed to foster, rather then inhibit, the use of ADR. Other recommendations reflected in the legislation include 88-11, *Encouraging Settlements by Protecting Mediator Confidentiality*, 1 CFR §305.88-11 (1992); 86-8, *Acquiring the Services of "Neutrals" for Alternative Means of Dispute Resolution*, 1 CFR §305.86-8 (1992); and 87-5, *Arbitration in Federal Programs*, 1 CFR §305.87-5 (1992).

On April 12, 1988, S. 2274, the Administrative Dispute Resolution Act of 1988, was introduced in the Senate by Senator Charles Grassley and referred to the Committee on Governmental Affairs. Introductory information is found at 134 Cong. Rec. S 3803 (daily ed. April 12, 1988). Hearings were held on May 25, 1988 before the Judiciary Subcommittee on Courts and

Administrative Practice. A virtually identical bill was introduced in the House of Representatives by Representative Donald Pease on July 27, 1988. The House bill, H.R. 5101, was referred to the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary. Introductory information is found at 134 Cong. Rec. H 5990 (daily ed. July 27, 1988). Hearings were held before the Subcommittee on June 16, 1988. Neither bill was reported to the floor for House or Senate action.

The bill that became the Administrative Dispute Resolution Act was again introduced by Senator Grassley on May 11, 1989 as S. 971 and referred to the Senate Committee on Governmental Affairs. 135 Cong. Rec. S 5166 (daily ed. May 11, 1989). The bill was the subject of hearings by the Subcommittee on Oversight of Government Management on September 19, 1989. The Senate Committee on Governmental Affairs reported the bill to the floor of the Senate for action on October 19, 1990. S. Rep. No. 1005, 101st Cong., 2d Sess. (1990). The Senate passed the bill by voice vote on October 24, 1990. 136 Cong. Rec. S18082-18091 (daily ed. October 24, 1990). Several of the Act's provisions were discussed at that time, including the meaning of the confidentiality protections; their relation to FOIA disclosure provisions; operation of the administrative arbitration attorneys fee section; and exemption of certain federal personnel appeals from the Act. The Senate bill was reported to the House on October 24, 1990.

On May 25, 1989, a comparable bill was introduced in the House by Congressmen Glickman and Pease as H.R. 2497. The bill was referred to the House Committee on the Judiciary. 135 Cong. Rec. H 2206 (daily ed. May 25, 1989). Hearings were held by the Subcommittee on Administrative Law and Governmental Relations on January 31, 1990. On April 25, 1990, Subcommittee markup was completed and the bill, as amended, was forwarded to the full Committee. *Administrative Dispute Resolution Act, 1990: Hearings on H.R. 2497 Before the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary*, 101st Cong., 2d Sess. (1990). The Judiciary Committee completed consideration and markup on May 22, 1990 and the amended bill was reported to the House floor on June 1, 1990. See H. R. Rep. No. 101-513, 101st Cong., 2d Sess. (1990). The bill passed by voice vote on June 5, 1990. 136 Cong. Rec. H 3152 (daily ed. June 5, 1990). Following Senate passage of H.R. 2497 in comparable form, the House passed the Senate version on

October 26, 1990. The President signed the bill into law on November 15, 1990.

Several changes were made to resolve differences in the House and Senate bills and to deal with concerns raised, including those mentioned. One major change made to both bills prior to passage involved arbitration awards. At the instigation of the respective House and Senate Committees, the Department of Justice, the Conference, and the American Bar Association developed amendments to permit arbitration in federal programs under the unique 30-day delayed finality provision that requires payment of attorneys fees in most cases for which an award is vacated by the agency head.

Source Note:

Literature on ADR is immense, and this Bibliography focuses on a small selection of items involving federal agencies. A much more extensive list of additional references on dispute resolution in the federal government is available from the Conference; its *Sourcebook: Federal Agency Use of Alternative Means of Dispute Resolution* (1987), is available from GPO. The U.S. Army Corps of Engineers has developed a series of brochures on using minitrials and other ADR methods. It, FMCS, and the Conference have also prepared educational and training materials on ADR in federal agencies.

Several useful sources regularly publish short news articles relevant to federal agencies. These include the BNA World Arbitration and Mediation Report, Dispute Resolution (published by the ABA), Alternatives to the High Cost of Litigation (published by the Center for Public Resources), Consensus (published by the Harvard Project on Negotiation), and the Administrative Conference News.

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1. See Legislative History above.

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3. Administrative Conference of the U.S., Recommendation 88-5, *Agency Use of Settlement Judges*, 1 CFR §305.88-5 (1992).

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Appendix:

1. Administrative Dispute Resolution Act, 5 U.S.C. §§556(c), 581-593; 9 U.S.C. §10; 41 U.S.C. §§604-607; 29 U.S.C. §173; 28 U.S.C. §2672; 31 U.S.C. §3711(a)(2).

2. Administrative Procedure Technical Amendments Act of 1991, H.R.2549, 102nd Congress, 1st session.

3. Administrative Conference of the U.S., Roster rules, 1 CFR §§316.100-316.302 (1991), 54 Fed. Reg. 39724 (September 28, 1989).

Administrative Dispute Resolution Act

Sec. 2. Congressional Findings

The Congress finds that--

(1) administrative procedure, as embodied in chapter 5 of title 5, United States Code, and other statutes, is intended to offer a prompt, expert, and inexpensive means of resolving disputes as an alternative to litigation in the Federal courts;

(2) administrative proceedings have become increasingly formal, costly, and lengthy resulting in unnecessary expenditures of time and in a decreased likelihood of achieving consensual resolution of disputes;

(3) alternative means of dispute resolution have been used in the private sector for many years and, in appropriate circumstances, have yielded decisions that are faster, less expensive, and less contentious;

(4) such alternative means can lead to more creative, efficient, and sensible outcomes;

(5) such alternative means may be used advantageously in a wide variety of administrative programs;

(6) explicit authorization of the use of well-tested dispute resolution techniques will eliminate ambiguity of agency authority under existing law;

(7) Federal agencies may not only receive the benefit of techniques that were developed in the private sector, but may also take the lead in the further development and refinement of such techniques; and

(8) the availability of a wide range of dispute resolution procedures, and an increased understanding of the most effective use of such procedures, will enhance the operation of the Government and better serve the public.

Sec. 3. Promotion of Alternative Means of Dispute Resolution

(a) Promulgation of Agency Policy. Each agency shall adopt a policy that addresses the use of alternative means of dispute resolution and case management. In developing such a policy, each agency shall--

(1) consult with the Administrative Conference of the United States and the Federal Mediation and Conciliation Service; and

(2) examine alternative means of resolving disputes in connection with--

(A) formal and informal adjudications;

(B) rulemakings;

(C) enforcement actions;

(D) issuing and revoking licenses or permits;

(E) contract administration;

(F) litigation brought by or against the agency; and

(G) other agency actions.

(b) Dispute Resolution Specialists. The head of each agency shall designate a senior official to be the dispute resolution specialist of the agency. Such official shall be responsible for the implementation of--

(1) the provisions of this Act and the amendments made by this Act; and

(2) the agency policy developed under subsection (a).

(c) Training. Each agency shall provide for training on a regular basis for the dispute resolution specialist of the agency and other employees involved in implementing the policy of the agency developed under subsection (a). Such training should encompass the theory and practice of negotiation, mediation, arbitration, or related techniques. The dispute resolution specialist shall periodically recommend to the agency head agency employees who would benefit from similar training.

(d) Procedures for Grants and Contracts.

(1) Each agency shall review each of its standard agreements for contracts, grants, and other assistance and shall determine whether to amend any such standard agreements to authorize and encourage the use of alternative means of dispute resolution.

(2)(A) Within 1 year after the date of the enactment of this Act [Nov. 15, 1990], the Federal Acquisition Regulation shall be amended, as necessary, to carry out this Act and the amendments made by this Act.

(B) For purposes of this section, the term `Federal Acquisition Regulation' means the single system of Government-wide procurement regulation referred to in section 6(a) of the Office of Federal Procurement Policy Act (41 U.S.C. 405(a)).

Sec. 4. Administrative Procedures.

(a) Administrative Hearings.--Section 556(c) of title 5, United States Code, is amended--

(1) in paragraph (6) by inserting before the semicolon at the end thereof the following: "or by the use of alternative means of dispute resolution as provided in subchapter IV of this chapter"; and

(2) by redesignating paragraphs (7) through (9) as paragraphs (92) through (11), respectively, and inserting after paragraph (6) the following new paragraphs:

"(7) inform the parties as to the availability of one or more alternative means of dispute resolution, and encourage use of such methods;

"(8) require the attendance at any conference held pursuant to paragraph (6) of at least one representative of each party who has authority to negotiate concerning resolution of issues in controversy;".

(b) Alternative Means of Dispute Resolution.-Chapter 5 of title 5, United States Code, is amended by adding at the end the following new subchapter:

Subchapter IV Alternative Means of Dispute Resolution in the Administrative Process[1]

§581. Definitions.
§582. General authority.
§583. Neutrals.
§584. Confidentiality.
§585. Authorization of arbitration.
§586. Enforcement of arbitration agreements.
§587. Arbitrators.
§588. Authority of the arbitrator.
§589. Arbitration proceedings.
§590. Arbitration awards.
§591. Judicial review.[2]
§592. Compilation of information.
§593. Support services.

§581. Definitions

For the purposes of this subchapter, the term--

(1) "agency" has the same meaning as in section 551(1) of this title;

(2) "administrative program" includes a Federal function which involves protection of the public interest and the determination of rights, privileges, and obligations of private persons through rule making, adjudication, licensing, or investigation, as those terms are used in subchapter II of this chapter;

(3) "alternative means of dispute resolution" means any procedure that is used, in lieu of an adjudication as defined in section 551(7) of this title, to resolve issues in controversy, including but not limited to, settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, or any combination thereof;

(4) "award" means any decision by an arbitrator resolving the issues in controversy;

(5) "dispute resolution communication" means any oral or written communication prepared for the purposes of a dispute resolution proceeding, including any memoranda, notes or work product of the neutral, parties or nonparty participant; except that a written agreement to enter into a dispute resolution proceeding, or final written agreement or arbitral award reached as a result of a dispute resolution proceeding, is not a dispute resolution communication;

(6) "dispute resolution proceeding" means any process in which an alternative means of dispute resolution is used to resolve an issue in controversy in which a neutral is appointed and specified parties participate;

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[1] So in original. Two subchapters IV and two sections 581 to 590 have been enacted.

[2] So in original. Does not conform to section catchline.

(7) "in confidence" means, with respect to information, that the information is provided--

(A) with the expressed intent of the source that it not be disclosed; or

(B) under circumstances that would create the reasonable expectation on behalf of the source that the information will not be disclosed;

(8) "issue in controversy" means an issue which is material to a decision concerning an administrative program of an agency, and with which there is disagreement between the agency and persons who would be substantially affected by the decision but shall not extend to matters specified under the provisions of sections 2302 and 7121(c) of title 5;[3]

(9) "neutral" means an individual who, with respect to an issue in controversy, functions specifically to aid the parties in resolving the controversy;

(10) "party" means--

(A) for a proceeding with named parties, the same as in section 551(3) of this title; and

(B) for a proceeding without named parties, a person who will be significantly affected by the decision in the proceeding and who participates in the proceeding;

(11) "person" has the same meaning as in section 551(2) of this title; and

(12) "roster" means a list of persons qualified to provide services as neutrals.

(Added Pub. L. 101-552, §4(b), Nov. 15, 1990, 104 Stat. 2738.)

§582. General authority

(a) An agency may use a dispute resolution proceeding for the resolution of an issue in controversy that relates to an administrative program, if the parties agree to such proceeding.

(b) An agency shall consider not using a dispute resolution proceeding if--

(1) a definitive or authoritative resolution of the matter is required for precedential value, and such a proceeding is not likely to be accepted generally as an authoritative precedent;

(2) the matter involves or may bear upon significant questions of Government policy that require additional procedures before a final resolution may be made, and such a proceeding would not likely serve to develop a recommended policy for the agency;

(3) maintaining established policies is of special importance, so that variations among individual decisions are not increased and such a proceeding would not likely reach consistent results among individual decisions;

(4) the matter significantly affects persons or organizations who are not parties to the proceeding;

(5) a full public record of the proceeding is important, and a dispute resolution proceeding cannot provide such a record; and

(6) the agency must maintain continuing jurisdiction over the matter with authority to alter the disposition of the matter in the light of changed circumstances, and a dispute resolution proceeding would interfere with the agency's fulfilling that requirement.

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[3] So in original. Probably should be "of this title;".

(c) Alternative means of dispute resolution authorized under this subchapter are voluntary procedures which supplement rather than limit other available agency dispute resolution techniques.
(Added Pub. L. 101-552, §4(b), Nov. 15, 1990, 104 Stat. 2739.)

§583. Neutrals

(a) A neutral may be a permanent or temporary officer or employee of the Federal Government or any other individual who is acceptable to the parties to a dispute resolution proceeding. A neutral shall have no official, financial, or personal conflict of interest with respect to the issues in controversy, unless such interest is fully disclosed in writing to all parties and all parties agree that the neutral may serve.

(b) A neutral who serves as a conciliator, facilitator, or mediator serves at the will of the parties.

(c) In consultation with the Federal Mediation and Conciliation Service, other appropriate Federal agencies, and professional organizations experienced in matters concerning dispute resolution, the Administrative Conference of the United States shall--

(1) establish standards for neutrals (including experience, training, affiliations, diligence, actual or potential conflicts of interest, and other qualifications) to which agencies may refer;

(2) maintain a roster of individuals who meet such standards and are otherwise qualified to act as neutrals, which shall be made available upon request;

(3) enter into contracts for the services of neutrals that may be used by agencies on an elective basis in dispute resolution proceedings; and

(4) develop procedures that permit agencies to obtain the services of neutrals on an expedited basis.

(d) An agency may use the services of one or more employees of other agencies to serve as neutrals in dispute resolution proceedings. The agencies may enter into an interagency agreement that provides for the reimbursement by the user agency or the parties of the full or partial cost of the services of such an employee.

(e) Any agency may enter into a contract with any person on a roster established under subsection (c)(2) or a roster maintained by other public or private organizations, or individual for services as a neutral, or for training in connection with alternative means of dispute resolution. The parties in a dispute resolution proceeding shall agree on compensation for the neutral that is fair and reasonable to the Government.
(Added Pub. L. 101-552, §4(b), Nov. 15, 1990, 104 Stat. 2739.)

§584. Confidentiality

(a) Except as provided in subsections (d) and (e), a neutral in a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any information concerning any dispute resolution communication or any communication provided in confidence to the neutral, unless--

(1) all parties to the dispute resolution proceeding and the neutral consent in writing, and, if the dispute resolution communication was provided by a nonparty participant, that participant also consents in writing;

(2) the dispute resolution communication has already been made public;

(3) the dispute resolution communication is required by statute to be made public, but a neutral should make such communication public only if no other person is reasonably available to disclose the communication; or

(4) a court determines that such testimony or disclosure is necessary to--

(A) prevent a manifest injustice;

(B) help establish a violation of law; or

(C) prevent harm to the public health or safety,

of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential.

(b) A party to a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any information concerning any dispute resolution communication, unless--

(1) the communication was prepared by the party seeking disclosure;

(2) all parties to the dispute resolution proceeding consent in writing;

(3) the dispute resolution communication has already been made public;

(4) the dispute resolution communication is required by statute to be made public;

(5) a court determines that such testimony or disclosure is necessary to--

(A) prevent a manifest injustice;

(B) help establish a violation of law; or

(C) prevent harm to the public health and safety,

of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential;

(6) the dispute resolution communication is relevant to determining the existence or meaning of an agreement or award that resulted from the dispute resolution proceeding or to the enforcement of such an agreement or award; or

(7) the dispute resolution communication was provided to or was available to all parties to the dispute resolution proceeding.

(c) Any dispute resolution communication that is disclosed in violation of subsection (a) or (b), shall not be admissible in any proceeding relating to the issues in controversy with respect to which the communication was made.

(d) The parties may agree to alternative confidential procedures for disclosures by a neutral. Upon such agreement the parties shall inform the neutral before the commencement of the dispute resolution proceeding of any modifications to the provisions of subsection (a) that will govern the confidentiality of the dispute resolution proceeding. If the parties do not so inform the neutral, subsection (a) shall apply.

(e) If a demand for disclosure, by way of discovery request or other legal process, is made upon a neutral regarding a dispute resolution communication, the neutral shall make reasonable efforts to notify the parties and any affected nonparty participants of the demand. Any party or affected nonparty participant who receives such notice and within 15 calendar days does not offer to defend a refusal of the neutral to disclose the requested information shall have waived any objection to such disclosure.

(f) Nothing in this section shall prevent the discovery or admissibility of any evidence that is otherwise discoverable, merely because the evidence was presented in the course of a dispute resolution proceeding.

(g) Subsections (a) and (b) shall have no effect on the information and data that are necessary to document an agreement reached or order issued pursuant to a dispute resolution proceeding.

(h) Subsections (a) and (b) shall not prevent the gathering of information for research or educational purposes, in cooperation with other agencies, governmental entities, or dispute resolution programs, so long as the parties and the specific issues in controversy are not identifiable.

(i) Subsections (a) and (b) shall not prevent use of a dispute resolution communication to resolve a dispute between the neutral in a dispute resolution proceeding and a party to or participant in such proceeding, so long as such dispute resolution communication is disclosed only to the extent necessary to resolve such dispute.

(j) This section shall not be considered a statute specifically exempting disclosure under section 552(b)(3) of this title.

(Added Pub. L. 101-552, §4(b), Nov. 15, 1990, 104 Stat. 2740.)

§585. Authorization of arbitration

(a)(1) Arbitration may be used as an alternative means of dispute resolution whenever all parties consent. Consent may be obtained either before or after an issue in controversy has arisen. A party may agree to--

(A) submit only certain issues in controversy to arbitration; or

(B) arbitration on the condition that the award must be within a range of possible outcomes.

(2) Any arbitration agreement that sets forth the subject matter submitted to the arbitrator shall be in writing.

(3) An agency may not require any person to consent to arbitration as a condition of entering into a contract or obtaining a benefit.

(b) An officer or employee of an agency may offer to use arbitration for the resolution of issues in controversy, if such officer or employee--

(1) has authority to enter into a settlement concerning the matter; or

(2) is otherwise specifically authorized by the agency to consent to the use of arbitration.

(Added Pub. L. 101-552, §4(b), Nov. 15, 1990, 104 Stat. 2742.)

§586. Enforcement of arbitration agreements

An agreement to arbitrate a matter to which this subchapter applies is enforceable pursuant to section 4 of title 9, and no action brought to enforce such an agreement shall be dismissed nor shall relief therein be denied on the grounds that it is against the United States or that the United States is an indispensable party.

(Added Pub. L. 101-552, §4(b), Nov. 15, 1990, 104 Stat. 2742.)

§587. Arbitrators

(a) The parties to an arbitration proceeding shall be entitled to participate in the selection of the arbitrator.

(b) The arbitrator shall be a neutral who meets the criteria of section 583 of this title.

(Added Pub. L. 101-552, §4(b), Nov. 15, 1990, 104 Stat. 2742.)

§588. Authority of the arbitrator

An arbitrator to whom a dispute is referred under this subchapter may--

(1) regulate the course of and conduct arbitral hearings;

(2) administer oaths and affirmations;

(3) compel the attendance of witnesses and production of evidence at the hearing under the provisions of section 7 of title 9 only to the extent the agency involved is otherwise authorized by law to do so; and

(4) make awards.

(Added Pub. L. 101-552, §4(b), Nov. 15, 1990, 104 Stat. 2742.)

§589. Arbitration proceedings

(a) The arbitrator shall set a time and place for the hearing on the dispute and shall notify the parties not less than 5 days before the hearing.

(b) Any party wishing a record of the hearing shall--

(1) be responsible for the preparation of such record;

(2) notify the other parties and the arbitrator of the preparation of such record;

(3) furnish copies to all identified parties and the arbitrator; and

(4) pay all costs for such record, unless the parties agree otherwise or the arbitrator determines that the costs should be apportioned.

(c)(1) The parties to the arbitration are entitled to be heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing.

(2) The arbitrator may, with the consent of the parties, conduct all or part of the hearing by telephone, television, computer, or other electronic means, if each party has an opportunity to participate.

(3) The hearing shall be conducted expeditiously and in an informal manner.

(4) The arbitrator may receive any oral or documentary evidence, except that irrelevant, immaterial, unduly repetitious, or privileged evidence may be excluded by the arbitrator.

(5) The arbitrator shall interpret and apply relevant statutory and regulatory requirements, legal precedents, and policy directives.

(d) No interested person shall make or knowingly cause to be made to the arbitrator an unauthorized ex parte communication relevant to the merits of the proceeding, unless the parties agree otherwise. If a communication is made in violation of this subsection, the arbitrator shall ensure that a memorandum of the communication is prepared and made a part of the record, and that an opportunity for rebuttal is allowed. Upon receipt of a communication made in violation of this subsection, the arbitrator may, to the extent consistent with the interests of justice and the policies underlying this subchapter, require the offending party to show cause why the claim of such party should not be resolved against such party as a result of the improper conduct.

(e) The arbitrator shall make the award within 30 days after the close of the hearing, or the date of the filing of any briefs authorized by the arbitrator, whichever date is later, unless--

(1) the parties agree to some other time limit; or

(2) the agency provides by rule for some other time limit.

(Added Pub. L. 101-552, §4(b), Nov. 15, 1990, 104 Stat. 2742.)

§590. Arbitration awards

(a)(1) Unless the agency provides otherwise by rule, the award in an arbitration proceeding under this subchapter shall include a brief, informal discussion of the factual and legal basis for the award, but formal findings of fact or conclusions of law shall not be required.

(2) The prevailing parties shall file the award with all relevant agencies, along with proof of service on all parties.

(b) The award in an arbitration proceeding shall become final 30 days after it is served on all parties. Any agency that is a party to the proceeding may extend this 30-day period for an additional 30-day period by serving a notice of such extension on all other parties before the end of the first 30-day period.

(c) The head of any agency that is a party to an arbitration proceeding conducted under this subchapter is authorized to terminate the arbitration proceeding or vacate any award issued pursuant to the proceeding before the award becomes final by serving on all other parties a written notice to that effect, in which case the award shall be null and void. Notice shall be provided to all parties to the arbitration proceeding of any request by a party, nonparty participant or other person that the agency head terminate the arbitration proceeding or vacate the award. An employee or agent engaged in the performance of investigative or prosecuting functions for an agency may not, in that or a factually related case, advise in a decision under this subsection to terminate an arbitration proceeding or to vacate an arbitral award, except as witness or counsel in public proceedings.

(d) A final award is binding on the parties to the arbitration proceeding, and may be enforced pursuant to sections 9 through 13 of title 9. No action brought to enforce such an award shall be dismissed nor shall relief therein be denied on the grounds that it is against the United States or that the United States is an indispensable party.

(e) An award entered under this subchapter in an arbitration proceeding may not serve as an estoppel in any other proceeding for any issue that was resolved in the proceeding. Such an award also may not be used as precedent or otherwise be considered in any factually unrelated proceeding, whether conducted under this subchapter, by an agency, or in a court, or in any other arbitration proceeding.

(f) An arbitral award that is vacated under subsection (c) shall not be admissible in any proceeding relating to the issues in controversy with respect to which the award was made.

(g) If an agency head vacates an award under subsection (c), a party to the arbitration (other than the United States) may within 30 days of such action petition the agency head for an award of attorney fees and expenses (as defined in

section 504(b)(1)(A) of this title) incurred in connection with the arbitration proceeding. The agency head shall award the petitioning party those fees and expenses that would not have been incurred in the absence of such arbitration proceeding, unless the agency head or his or her designee finds that special circumstances make such an award unjust. The procedures for reviewing applications for awards shall, where appropriate, be consistent with those set forth in subsection (a)(2) and (3) of section 504 of this title. Such fees and expenses shall be paid from the funds of the agency that vacated the award.
(Added Pub. L. 101-552, §4(b), Nov. 15, 1990, 104 Stat. 2743.)

§591. Judicial Review

(a) Notwithstanding any other provision of law, any person adversely affected or aggrieved by an award made in an arbitration proceeding conducted under this subchapter may bring an action for review of such award only pursuant to the provisions of sections 9 through 13 of title 9.

(b)(1) A decision by an agency to use or not to use a dispute resolution proceeding under this subchapter shall be committed to the discretion of the agency and shall not be subject to judicial review, except that arbitration shall be subject to judicial review under section 10(b) of title 9.

(2) A decision by the head of an agency under section 590 to terminate an arbitration proceeding or vacate an arbitral award shall be committed to the discretion of the agency and shall not be subject to judicial review.
(Added Pub. L. 101-552, §4(b), Nov. 15, 1990, 104 Stat. 2744.)

§592. Compilation of information

The Chairman of the Administrative Conference of the United States shall compile and maintain data on the use of alternative means of dispute resolution in conducting agency proceedings. Agencies shall, upon the request of the Chairman of the Administrative Conference of the United States, supply such information as is required to enable the Chairman to comply with this section.
(Added Pub. L. 101-552, §4(b), Nov. 15, 1990, 104 Stat. 2744.)

§593. Support services

For the purposes of this subchapter, an agency may use (with or without reimbursement) the services and facilities of other Federal agencies, public and private organizations and agencies, and individuals, with the consent of such agencies, organizations, and individuals. An agency may accept voluntary and uncompensated services for purposes of this subchapter without regard to the provisions of section 1342 of title 31.
(Added Pub. L. 101-552, §4(b), Nov. 15, 1990, 104 Stat. 2745.)

Sec. 5. Judicial Review of Arbitration Awards.

Section 10 of title 9, United States Code, is amended--

(1) by designating subsections (a) through (e) as paragraphs (1) through (5), respectively;

(2) by striking out "In either" and inserting in lieu thereof "(a) in any"; and

(3) by adding at the end thereof the following:

"(b) The United States district court for the district wherein an award was made that was issued pursuant to section 590 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 582 of title 5.".

Sec. 6. Government Contract Claims.

(a) Alternative Means of Dispute Resolution.--Section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 606) is amended by adding at the end the following new subsections:

"(d) Notwithstanding any other provision of this Act, a contractor and a contracting officer may use any alternative means of dispute resolution under subchapter IV of chapter 5 of title 5, United States Code, or other mutually agreeable procedures, for resolving claims. In a case in which such alternative means of dispute resolution or other mutually agreeable procedures are used, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his or her knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable. All provisions of subchapter IV of chapter 5 of title 5, United States Code, shall apply to such alternative means of dispute resolution.

"(e) The authority of agencies to engage in alternative means of dispute resolution proceedings under subsection (d) shall cease to be effective on October 1, 1995, except that such authority shall continue in effect with respect to then pending dispute resolution proceedings which, in the judgment of the agencies that are parties to such proceedings, require such continuation, until such proceedings terminate."

(b) Judicial Review of Arbitral Awards.--Section 8(g) of the Contract Disputes Act of 1978 (41 U.S.C. 607(g)) is amended by adding at the end the following new paragraph:

"(3) An award by an arbitrator under this Act shall be reviewed pursuant to sections 9 through 13 of title 9, United States Code, except that the court may set aside or limit any award that is found to violate limitations imposed by Federal statute."

Sec. 7. Federal Mediation and Conciation Service.

Section 203 of the Labor Management Relations Act, 1947 (29 U.S.C. 173) is amended by adding at the end the following new subsection:

"(f) The Service may make its services available to Federal agencies to aid in the resolution of disputes under the provisions of subchapter IV of chapter 5 of title 5, United States Code. Functions performed by the Service may include assisting parties to disputes related to administrative programs, training persons in skills and procedures employed in alternative means of dispute resolution, and furnishing officers and employees of the Service to act as neutrals. Only officers and employees who are qualified in accordance with section 583 of title 5, United

States Code, may be assigned to act as neutrals. The Service shall consult with the Administrative Conference of the United States and other agencies in maintaining rosters of neutrals and arbitrators, and to adopt such procedures and rules as are necessary to carry out the services authorized in this subsection."

Sec. 8. Government Tort and Other Claims.

(a) Federal Tort Claims.--Section 2672 of title 28, United States Code, is amended by adding at the end of the first paragraph the following: "Notwithstanding the proviso contained in the preceding sentence, any award, compromise, or settlement may be effected without the prior written approval of the Attorney General or his or her designee, to the extent that the Attorney General delegates to the head of the agency the authority to make such award, compromise, or settlement. Such delegations may not exceed the authority delegated by the Attorney General to the United States attorneys to settle claims for money damages against the United States. Each Federal agency may use arbitration, or other alternative means of dispute resolution under the provisions of subchapter IV of chapter 5 of title 5, to settle any tort claim against the United States, to the extent of the agency's authority to award, compromise, or settle such claim without the prior written approval of the Attorney General or his or her designee.".

(b) Claims of the Government.--Section 3711(a)(2) of title 31, United States Code, is amended by striking out "$20,000 (excluding interest)" and inserting in lieu thereof "$100,000 (excluding interest) or such higher amount as the Attorney General may from time to time prescribe.".

Sec. 9. Use of Nonattorneys

Section 9 of Pub. L. 101-552 provided that:

"**(a) Representation of Parties.** Each agency, in developing a policy on the use of alternative means of dispute resolution under this Act, shall develop a policy with regard to the representation by persons other than attorneys of parties in alternative dispute resolution proceedings and shall identify any of its administrative programs with numerous claims or disputes before the agency and determine--

"(1) the extent to which individuals are represented or assisted by attorneys or by persons who are not attorneys; and

"(2) whether the subject areas of the applicable proceedings or the procedures are so complex or specialized that only attorneys may adequately provide such representation or assistance.

"**(b) Representation and Assistance by Nonattorneys.** A person who is not an attorney may provide representation or assistance to any individual in a claim or dispute with an agency, if--

"(1) such claim or dispute concerns an administrative program identified under subsection (a);

"(2) such agency determines that the proceeding or procedure does not necessitate representation or assistance by an attorney under subsection (a)(2); and

"(3)such person meets any requirement of the agency to provide representation or assistance in such a claim or dispute.

"(c) Disqualification of Representation or Assistance. Any agency that adopts regulations under subchapter IV of chapter 5 of title 5, United States Code, to permit representation or assistance by persons who are not attorneys shall review the rules of practice before such agency to--

"(1) ensure that any rules pertaining to disqualification of attorneys from practicing before the agency shall also apply, as appropriate, to other persons who provide representation or assistance; and

"(2) establish effective agency procedures for enforcing such rules of practice and for receiving complaints from affected persons."

Sec. 10. Definitions

Section 10 of Pub. L. 101-552 provided that: "As used in this Act, the terms 'agency', 'administrative program', and 'alternative means of dispute resolution' have the meanings given such terms in section 581 of title 5, United States Code, as added by section 4(b) of this Act."

Sec. 11. Termination Date; Savings Provision

Section 11 of Pub. L. 101-552 provided that: "The authority of agencies to use dispute resolution proceedings under this Act and the amendments made by this Act shall terminate on October 1, 1995, except that such authority shall continue in effect with respect to then pending proceedings which, in the judgment of the agencies that are parties to the dispute resolution proceedings, require such continuation, until such proceedings terminate."

Administrative Procedure Technical Amendments Act of 1991

H.R.2549, 102nd Congress, 1st session

102ND CONGRESS; 1ST SESSION
IN THE SENATE OF THE UNITED STATES
AS REFERRED IN THE SENATE

H. R. 2549

1991 H.R. 2549

SYNOPSIS:
AN ACT
To make technical corrections to chapter 5 of title 5, United States Code.

DATE OF INTRODUCTION: NOVEMBER 26, 1991

DATE OF VERSION: DECEMBER 2, 1991 -- VERSION: 3

SPONSOR(S):
Sponsor not included in this printed version.

TEXT:
* Be it enacted by the Senate and House of Representatives of the United*
*States of America in Congress assembled, *

SECTION 1. SHORT TITLE.

This Act may be cited as the "Administrative Procedure Technical Amendments Act of 1991".

SEC. 2. REDESIGNATION OF SUBCHAPTER III.

Subchapter III of chapter 5 of title 5, United States Code, is amended-

(1) by redesignating such subchapter as subchapter V;

(2) by redesignating sections 571 through 576 as sections 591 through 596, respectively; and

(3) in section 593(b)(4), as redesignated by paragraph (2), by striking "575" and inserting "595".

SEC. 3. REDESIGNATION OF SUBCHAPTER IV.

(a) NEGOTIATED RULEMAKING.-The subchapter IV entitled "NEGOTIATED RULEMAKING PROCEDURE" of chapter 5 of title 5, United States Code, is amended-

(1) by redesignating such subchapter as subchapter III and inserting such subchapter immediately after subchapter II of such chapter 5;

(2) by redesignating sections 581 through 590 as sections 561 through 570, respectively;

(3) in section 565(a)(1), as redesignated by paragraph (2) of this section, by striking "584" and inserting "564";

(4) in subsection (d) of secton 568, as redesignated by paragraph (2) of this section, by striking "589" and inserting "569"; and

(5) in section 569, as redesignated by paragraph (2) of this section-

(A) in subsection (d)(2) by striking "586" and inserting "566";

(B) in subsection (f)(2) by striking "588" and inserting "568"; and

(C) in subsection (g) by striking "575" and inserting "595".

(b) ALTERNATIVE DISPUTE RESOLUTION.-The subchapter IV entitled

1991 H.R. 2549 DECEMBER 2, 1991 -- VERSION: 3

ERNATIVE MEANS OF DISPUTE RESOLUTION IN THE ADMINISTRATIVE PROCESS"
chapter 5 of title 5, United States Code, is amended-

(1) by inserting such subchapter immediately after subchapter III of such chapter (as redesignated by subsection (a)(1) of this section);

(2) by redesignating sections 581 through 593 as sections 571 through 583 respectively;

(3) in subsection (b) of section 577, as redesignated by paragraph (2) of this section, by striking "583" and inserting "573"; and

(4) in subsection (b)(2) of section 581, as redesignated by paragraph (2) of this section, by striking "590" and inserting "580".

SEC. 4. CLERICAL AMENDMENTS.

The table of sections at the beginning of chapter 5 of title 5, United States Code, is amended by striking "SUBCHAPTER III" and all that follows through the end of the table and inserting the following:

"SUBCHAPTER III-NEGOTIATED RULEMAKING PROCEDURE

"Sec. 561. Purpose.
"Sec. 562. Definitions.
"Sec. 563. Determination of need for negotiated rulemaking committee.
"Sec. 564. Publication of notice; applications for membership on committees.
"Sec. 565. Establishment of committee.
"Sec. 566. Conduct of committee activity.
"Sec. 567. Termination of committee.
"Sec. 568. Services, facilities, and payment of committee member expenses.
"Sec. 569. Role of the Administrative Conference of the United States and other entities.

"SUBCHAPTER IV-ALTERNATIVE MEANS OF DISPUTE RESOLUTION IN THE ADMINISTRATIVE PROCESS

"Sec. 571. Definitions.
"Sec. 572. General authority.
"Sec. 573. Neutrals.
"Sec. 574. Confidentiality.
"Sec. 575. Authorization of arbitration.
"Sec. 576. Enforcement of arbitration agreements.
"Sec. 577. Arbitrators.
"Sec. 578. Authority of the arbitrator.
"Sec. 579. Arbitration proceedings.
"Sec. 580. Arbitration awards.
"Sec. 581. Judicial review.
"Sec. 582. Compilation of information.
"Sec. 583. Support services.

"SUBCHAPTER V-ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

"Sec. 591. Purpose.
"Sec. 592. Definitions.
"Sec. 593. Administrative Conference of the United States.
"Sec. 594. Powers and duties of the Conference.
"Sec. 595. Organization of the Conference.
"Sec. 596. Authorization of appropriations.".

SEC. 5. ADDITIONAL TECHNICAL AND CONFORMING AMENDMENTS.

(A) NEGOTIATED RULEMAKING ACT OF 1990.-(1) Section 4 of the Negotiated Rulemaking Act of 1990 (Public Law 101-648; 104 Stat. 4976) is amended by striking "576" and inserting "596".

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section 5 of that Act is amended-

(A) by striking "Subchapter IV" and inserting "Subchapter III of chapter 5";

(B) by striking ", as added by section 3 of this Act," and inserting "(enacted as subchapter IV of chapter 5 of title 5, United States Code, by section 3 of this Act and redesignated as subchapter III of such chapter 5 by section (3)(a) of the Administrative Procedure Technical Amendments Act of 1991)"; and

(C) by striking "subchapter IV" and inserting "subchapter III".

(b) ADMINISTRATIVE DISPUTE RESOLUTION ACT.-(1) Paragraph (3) of section 71 of title 5, United States Code, as redesignated by section 3(b)(2) of this Act, is amended by inserting a comma after "including".

(2) Paragraph (8) of section 571 of title 5, United States Code, as redesignated by section 3(b)(2) of this Act, is amended to read as follows:

"(8) issue in controversy means an issue which is material to a decision concerning an administrative program of an agency, and with which there is disagreement-

"(A) between an agency and persons who would be substantially affected by the decision; or

"(B) between persons who would be substantially affected by the decision,

except that such term shall not include any matter specified under section 2302 or 7121(c) of this title;".

(3) Subsection (g) of section 580 of title 5, United States Code, as redesignated by section 3(b)(2) of this Act, is amended by striking "attorney fees and expenses" and inserting "fees and other expenses".

(4) Section 10(b) of title 9, United States Code (as added by section 5 of the Administrative Dispute Resolution Act (Public Law 101-552; 104 Stat. 2745)), is amended-

(A) by striking "590" and inserting "580"; and

(B) by striking "582" and inserting "572".

(5) Section 203(f) of the Labor Management Relations Act, 1947 (as added by section 7 of the Administrative Dispute Resolution Act (104 Stat. 2746)) is amended in the third sentence by striking "583" and inserting "573".

(6) Section 10 of the Administrative Dispute Resolution Act (104 Stat. 2747) is amended-

(A) by striking "581" and inserting "571"; and

(B) by striking ", as added by section 4(b) of this Act" and inserting "(enacted as section 581 of title 5, United States Code, by section 4(b) of this Act, and redesignated as section 571 of such title by section 3(b) of the Administrative Procedure Technical Amendments Act of 1991)".

Passed the House of Representatives November 25, 1991.

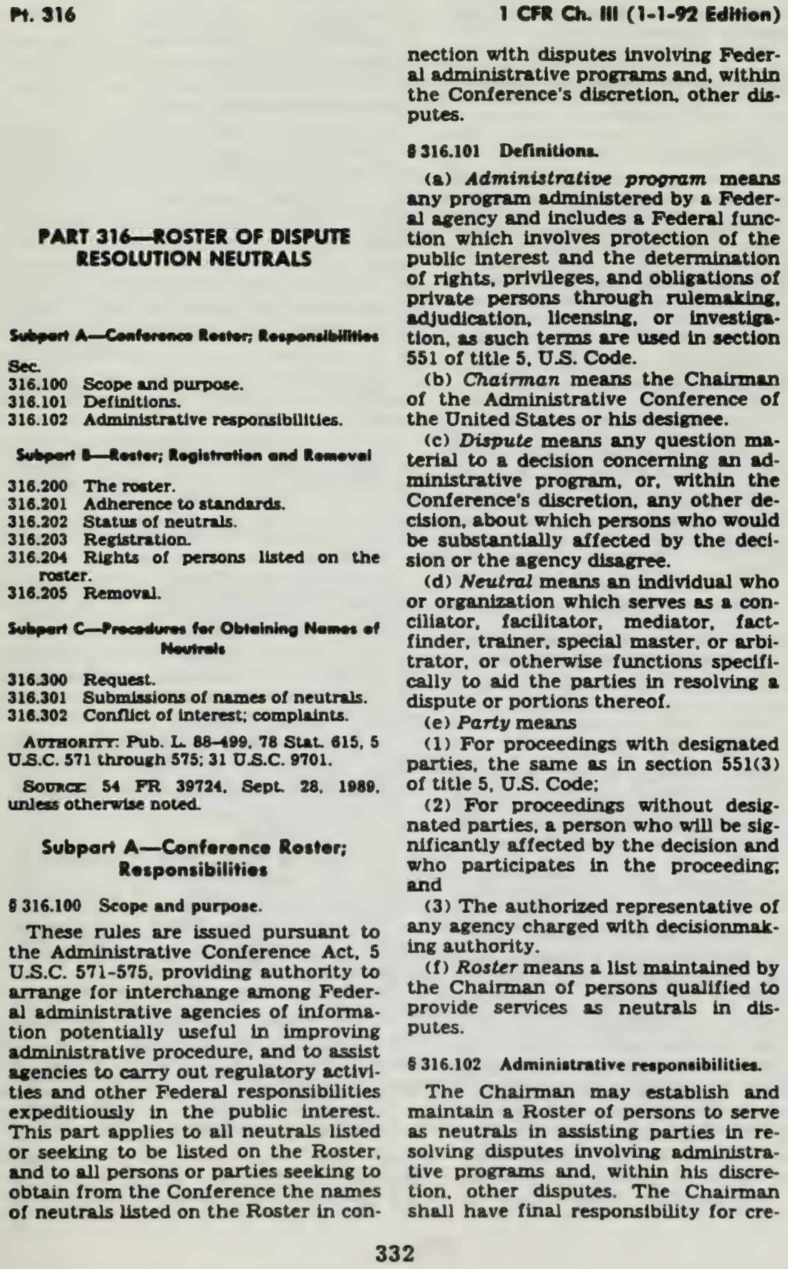
Attest: DONNALD K. ANDERSON,
Clerk.*

*

Administrative Conference of the United States

Roster rules, 1 CFR §§316.100-316.302 (1991)

54 Fed. Reg. 39724 (September 28, 1989)



PART 316—ROSTER OF DISPUTE RESOLUTION NEUTRALS

Subpart A—Conference Roster; Responsibilities

Sec.

316.100 Scope and purpose.
316.101 Definitions.
316.102 Administrative responsibilities.

Subpart B—Roster; Registration and Removal

316.200 The roster.
316.201 Adherence to standards.
316.202 Status of neutrals.
316.203 Registration.
316.204 Rights of persons listed on the roster.
316.205 Removal.

Subpart C—Procedures for Obtaining Names of Neutrals

316.300 Request.
316.301 Submissions of names of neutrals.
316.302 Conflict of interest; complaints.

AUTHORITY: Pub. L. 88-499, 78 Stat. 615, 5 U.S.C. 571 through 575; 31 U.S.C. 9701.

SOURCE: 54 FR 39724, Sept. 28, 1989, unless otherwise noted.

Subpart A—Conference Roster; Responsibilities

§ 316.100 Scope and purpose.

These rules are issued pursuant to the Administrative Conference Act, 5 U.S.C. 571-575, providing authority to arrange for interchange among Federal administrative agencies of information potentially useful in improving administrative procedure, and to assist agencies to carry out regulatory activities and other Federal responsibilities expeditiously in the public interest. This part applies to all neutrals listed or seeking to be listed on the Roster, and to all persons or parties seeking to obtain from the Conference the names of neutrals listed on the Roster in connection with disputes involving Federal administrative programs and, within the Conference's discretion, other disputes.

§ 316.101 Definitions.

(a) *Administrative program* means any program administered by a Federal agency and includes a Federal function which involves protection of the public interest and the determination of rights, privileges, and obligations of private persons through rulemaking, adjudication, licensing, or investigation, as such terms are used in section 551 of title 5, U.S. Code.

(b) *Chairman* means the Chairman of the Administrative Conference of the United States or his designee.

(c) *Dispute* means any question material to a decision concerning an administrative program, or, within the Conference's discretion, any other decision, about which persons who would be substantially affected by the decision or the agency disagree.

(d) *Neutral* means an individual who or organization which serves as a conciliator, facilitator, mediator, factfinder, trainer, special master, or arbitrator, or otherwise functions specifically to aid the parties in resolving a dispute or portions thereof.

(e) *Party* means

(1) For proceedings with designated parties, the same as in section 551(3) of title 5, U.S. Code;

(2) For proceedings without designated parties, a person who will be significantly affected by the decision and who participates in the proceeding; and

(3) The authorized representative of any agency charged with decisionmaking authority.

(f) *Roster* means a list maintained by the Chairman of persons qualified to provide services as neutrals in disputes.

§ 316.102 Administrative responsibilities.

The Chairman may establish and maintain a Roster of persons to serve as neutrals in assisting parties in resolving disputes involving administrative programs and, within his discretion, other disputes. The Chairman shall have final responsibility for creation and maintenance of the Roster. The Chairman may review the status of all persons whose continued eligibility for listing on the Roster has been questioned and make determinations about such eligibility according to the criteria set forth in § 316.205(a).

Subpart B—Roster; Registration and Removal

§ 316.200 The roster.

(a) The Roster shall consist of a listing of persons who provide all information required by the neutral registration form, and whose names have not been removed from the Roster in accordance with § 316.205(b).

(b) Neither the Chairman nor the Conference will warrant the accuracy of the information furnished by persons listed on the Roster.

§ 316.201 Adherence to standards.

Persons listed on the Roster shall have committed in writing to comply with all provisions of part 316 and subsequent amendments hereto as from time to time may be issued by the Conference.

§ 316.202 Status of neutrals.

Persons listed on the Roster are not employees of the Conference or Federal Government by virtue of their listing.

§ 316.203 Registration.

(a) Persons wishing to be listed on the Roster will obtain and complete a current neutral registration form and have it notarized or otherwise attested.

(b) Upon receipt of a completed registration form, the Chairman will review the form to assure that all required information has been provided. The Chairman reserves the right to review and to verify data submitted, but any such attempts to verify submitted data will not constitute a warranty of accuracy. A prospective registrant shall be notified promptly in writing of a decision that an application is accepted, incomplete or inaccurate. The Conference may require persons wishing to be listed to provide additional information from time to time. All decisions by the Chairman about whether a registration form is sufficiently complete and accurate are final.

(c) At least once every two years, a person listed on the Roster will either (1) submit a new registration form, or (2) send the Chairman a short letter verifying the continuing accuracy of the person's current listing.

(d) Persons wishing to be listed on the Roster must agree that the Chairman may provide the names, addresses and telephone numbers of parties in cases handled, including all cases to which the neutral was referred as a result of listing on the Roster. They shall also certify that all data supplied are accurate and agree to abide by ethical standards that may be promulgated by the Society of Professionals in Dispute Resolution and such other standards as may be applicable to them.

(e) The Chairman reserves the right to charge fees for obtaining or renewing listing or for using the Roster.

§ 316.204 Rights of persons listed on the roster.

(a) No person shall have any right to be listed, to remain listed, nor to be referred or selected for any dispute.

(b) A person listed on the Roster may request placement on inactive status, return to active status, or removal from the Roster.

(c) Neutrals may request revision of data supplied on the neutral evaluation form, or any summaries thereof.

§ 316.205 Removal.

(a) Any person may be removed from the Roster by the Chairman whenever the neutral:

(1) Is found to have submitted materially false data in connection with registration on the Roster;

(2) Fails or refuses to provide information required to obtain or maintain registration or to make reasonable and prompt reports, as required by Conference procedures;

(3) Fails to disclose any information required by section 302(a);

(4) Has been the subject of complaints of significant unethical or illegal behavior by parties who use the

neutral's services as a result of referral from the Roster and the Chairman after appropriate inquiry finds just cause for removal; or

(5) Is found by the Chairman to have improperly disclosed any record or communication arising from a proceeding without the parties' consent unless such record or communication is properly ordered to be disclosed under the agency's applicable procedural rule or by a Court of competent jurisdiction.

(b) Prior to removal under subsection (a), the Chairman shall offer the neutral 45 days in which to submit arguments and evidence relevant to the decision. Any decision to remove a neutral's name from the Roster shall be accompanied by a brief statement of reasons.

Subpart C—Procedure for Obtaining Names of Neutrals

§ 316.300 Request.

Any party or parties to a dispute may file with the Chairman a written request for a list of neutrals. Telephone requests may be accepted at the Chairman's discretion. A request for the names of neutrals shall contain a brief statement of the nature of the dispute and the names, addresses and telephone numbers of all parties to the dispute. A request form has been prepared for parties' use. Requests should be addressed to: Manager of Roster Services, Office of the Chairman, Administrative Conference of the United States, 2120 L Street NW., Suite 500, Washington, DC 20037. The initiating party shall also file a copy of the request with every other party to the dispute. Neither the request for, nor the furnishing of, a list of names constitutes a determination that an agreement to mediate or enter into any other dispute resolution procedure exists, nor does such action constitute any finding about the obligations of the parties.

§ 316.301 Submission of names of neutrals.

(a) Upon receipt of a request for names involving a Federal administrative program, the Chairman shall ordinarily send the requester approximately the requested number of names of listed neutrals who appear to be qualified and a biographical statement for each name so provided. The Chairman may in his discretion respond to requests regarding other disputes, and may establish procedures or guidance for the purpose of providing the parties with a list of names of neutrals. If the parties cannot agree on a neutral after the receipt of these names, the Chairman may, on the request of the parties and in his discretion, select an individual either named or not named in the list sent to the parties.

(b) The Chairman reserves the right to decline to submit names if the request is unduly burdensome or otherwise impracticable.

(c) If jointly requested by all parties, the Chairman may furnish a second, or third, list of names to the parties. Requests for further lists in that dispute will not be honored.

(d) The parties shall notify the Chairman of their selection of a neutral and of the identity of the neutral selected, or of the decision not to use the services of a neutral whose name was furnished by the Conference.

§ 316.302 Conflict of interest; complaints.

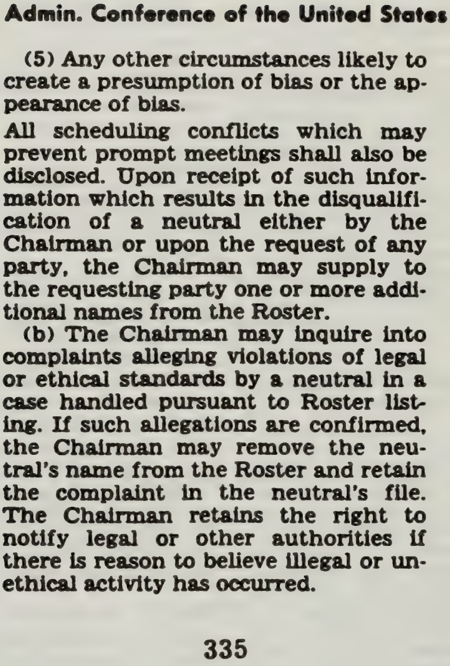
(a) Any person listed on the Roster, who is contacted by a party to a dispute as a result of that listing, must disclose to all parties to that dispute, prior to beginning dispute resolution efforts, the following interests or relationships:

(1) Any existing or past financial, business, professional, family, social or other relationships with any of the parties to the dispute, their employees, or their attorneys;

(2) Previous or current involvement in the dispute at hand;

(3) Past or prospective employment, including employment as a neutral in previous disputes, by any of the parties;

(4) Past or present receipt of a significant portion of the neutral's general operating funds or grants to the neutral or the organization by which the neutral is employed from one or more of the parties to the dispute; or



(5) Any other circumstances likely to create a presumption of bias or the appearance of bias.

All scheduling conflicts which may prevent prompt meetings shall also be disclosed. Upon receipt of such information which results in the disqualification of a neutral either by the Chairman or upon the request of any party, the Chairman may supply to the requesting party one or more additional names from the Roster.

(b) The Chairman may inquire into complaints alleging violations of legal or ethical standards by a neutral in a case handled pursuant to Roster listing. If such allegations are confirmed, the Chairman may remove the neutral's name from the Roster and retain the complaint in the neutral's file. The Chairman retains the right to notify legal or other authorities if there is reason to believe illegal or unethical activity has occurred.

Agency Practice Act

Citations:

5 U.S.C. §500; enacted November 8, 1965, by Pub. L. No. 89-332, 79 Stat. 1281; incorporated into the U.S. Code by Pub. L. No. 90-83, 81 Stat. 195 (September 11, 1967) (with minor stylistic changes).

Overview:

The Agency Practice Act provides that an attorney in good standing in any state may represent persons before federal agencies. An agency may require an attorney to file a written declaration of current qualification and to state that he is authorized to represent the particular person before the agency. Similarly, a duly qualified certified public accountant may represent persons before the Internal Revenue Service. The Act was intended to prohibit agency-established admission requirements for licensed attorneys and special enrollment requirements for CPAs. (Note: The Patent and Trademark Office is exempted from the Act.[1]) The Act expressly neither grants nor denies other persons the right to practice before an agency, nor does it authorize or limit an agency's right to discipline or disbar persons practicing before it.[2]

In 1982, the Administrative Conference adopted a statement on discipline of attorneys practicing before federal agencies (1 CFR §310.8). After studying agency concerns and existing disciplinary procedures,[3] the Conference concluded that any current problems concerning attorney discipline before federal agencies were not of such magnitude or so widespread as to require legislative action or the adoption of uniform federal standards.

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[1] See 37 CFR Subch. A, Part 1 for Patent and Trademark Office practice procedures.

[2] For discussion of admission and discipline of attorneys under the Agency Practice Act, see Michael P. Cox, *Regulation of Attorneys Practicing Before Federal Agencies*, Report to the Administrative Conference of the U.S., 1982 ACUS (Vol. II) 491, *reprinted in* 34 Case Western Reserve L. Rev. 173, 186-193 (1984).

Legislative History:

In 1957 the Department of Justice recommended discontinuing the practice of many agencies whereby attorneys were required to apply for acceptance by the agency as practitioners. Several bills were introduced in the early 1960s to abolish agency admission requirements. By 1965 few agencies retained admission requirements, and only the Treasury Department and the Patent Office objected to discontinuing them. (See House Judiciary Committee Report, cited below.) Pub. L. No. 89-332 was enacted in 1965 with the passage of S. 1758.

Source Note:

The House report on S. 1758 is reprinted in U.S. Code Congressional and Administrative News. Professor Michael P. Cox's 1982 report to the Administrative Conference discusses federal agency attorney discipline and contains an extensive bibliography. See also the statement of the Administrative Conference (1 CFR §310.8) and the reports of the Administrative Conference and American Bar Association committees cited below.

Also relevant is section 9 of the Administrative Dispute Resolution Act (see Chapter 3).

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[3] Id.

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3. Administrative Conference of the U.S., Recommendation 86-1, *Nonlawyer Assistance and Representation*, 1 CFR §305.86-1 (1992).

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2. Comment, *Determining Secondary Liability under Securities Laws: Attorney Beware!*, 11 Hamline L. Rev. 61, 96-104 (1988).

3. Cox, *Regulation of Attorneys Practicing Before Federal Agencies*, Report to the Administrative Conference of the U.S., 1982 ACUS (Vol. II) 491, *reprinted in* 34 Case W. Res. L. Rev. 173 (1984).

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Commodity Futures Trading Commission	17 CFR §§10.11, 14.1-.10
Consumer Product Safety Commission	16 CFR §§1025.61-.67
Drug Enforcement Administration (Justice)	21 CFR §§1316.50-.51
Education	34 CFR §78.44
Energy	10 CFR Chapter X
Environmental Protection Agency	40 CFR §22.10
Farm Credit Administration	12 CFR Parts 622, 623
Federal Communications Commission	47 CFR §§1.22-.25
Federal Deposit Insurance Corporation	12 CFR §308.08
Federal Energy Regulatory Commission	18 CFR §§385.2101-.2103
Federal Maritime Commission	46 CFR §§502.21-.32
Federal Mine Safety and Health Review Commission	29 CFR §§2700.3, 2700.80
Federal Reserve Board	12 CFR §263.3
Federal Trade Commission	16 CFR §4.1
Food and Drug Administration	21 CFR §12.40
Housing and Urban Development	24 CFR §§2.11-.13
Office of Interstate Land Sales Registration	24 CFR §§1720.120, .130, .135
Immigration and Naturalization Service (Justice)	8 CFR Part 292
Interior	43 CFR Part 1
Internal Revenue Service	31 CFR Part 10
Interstate Commerce Commission	49 CFR Part 1103
Labor (Employees' Compensation Appeals Board)	20 CFR §501.11
Maritime Administration (Transportation)	46 CFR §§201.15-.26
National Labor Relations Board	29 CFR Part 102
National Transportation Safety Board	49 CFR §821.6
Nuclear Regulatory Commission	10 CFR §2.713
Occupational Safety and Health Review Commission	29 CFR §§2200.1,2200.21-.23
Office of Thrift Supervision (Treasury)	12 CFR §509.5
Postal Rate Commission	39 CFR §3001.6
Postal Service	39 CFR Part 951
Securities and Exchange Commission	17 CFR §201.2
Small Business Administration	13 CFR Part 103

Social Security Administration (Health and Human Services)	20 CFR §§404.1700-.1799
Treasury (Bureau of Alcohol, Tobacco, and Firearms)	31 CFR Part 8
United States International Trade Commission	19 CFR §201.15

Appendix:

1. Agency Practice Act, 5 U.S.C. §500.

Agency Practice Act

Title 5, U.S. Code

Subchapter I - General Provisions

§500. Administrative practice; general provisions

(a) For the purpose of this section-

(1) "agency" has the meaning given it by section 551 of this title; and

(2) "State" means a State, a territory or possession of the United States including a Commonwealth, or the District of Columbia.

(b) An individual who is a member in good standing of the bar of the highest court of a State may represent a person before an agency on filing with the agency a written declaration that he is currently qualified as provided by this subsection and is authorized to represent the particular person in whose behalf he acts.

(c) An individual who is duly qualified to practice as a certified public accountant in a State may represent a person before the Internal Revenue Service of the Treasury Department on filing with that agency a written declaration that he is currently qualified as provided by this subsection and is authorized to represent the particular person in whose behalf he acts.

(d) This section does not-

(1) grant or deny to an individual who is not qualified as provided by subsection (b) or (c) of this section the right to appear for or represent a person before an agency or in an agency proceeding;

(2) authorize or limit the discipline, including disbarment, of individuals who appear in a representative capacity before an agency;

(3) authorize an individual who is a former employee of an agency to represent a person before an agency when the representation is prohibited by statute or regulation; or

(4) prevent an agency from requiring a power of attorney as a condition to the settlement of a controversy involving the payment of money.

(e) Subsections (b)-(d) of this section do not apply to practice before the Patent Office with respect to patent matters that continue to be covered by chapter 3 (sections 31-33) of title 35.

(f) When a participant in a matter before an agency is represented by an individual qualified under subsection (b) or (c) of this section, a notice or other written communication required or permitted to be given the participant in the matter shall be given to the representative in addition to any other service specifically required by statute. When a participant is represented by more than one such qualified representative, service on any one of the representatives is sufficient.

(Added Pub. L. No. 90-83, §1(1)(A), Sept. 11, 1967, 81 Stat. 195.)

Claims and Debt Collection Acts

Citations:

Federal Claims Collection Act, 31 U.S.C. §3711 (a) through (e) (1988) (originally 31 U.S.C. §§951-953); enacted July 19, 1966 by Pub. L. No. 89-508, 80 Stat. 308; amended November 15, 1990 by Pub. L. No. 101-552.

Debt Collection Act, 5 U.S. Code §§552a (b) and (m), 5514; 18 U.S.C. §1114; 26 U.S.C. §§6103, 7213; 28 U.S.C. §2415(i); 31 U.S.C. §§3701, 3711(f), 3716-3719 (1988); enacted October 25, 1982 by Pub. L. No. 97-365, 96 Stat. 1749; amended November 29, 1983 by Pub. L. No. 98-167, 97 Stat. 1104.

Lead Agencies:

U.S. General Accounting Office, General Government Division, Claims Group, 441 G Street NW, Washington, DC 20548 (202) 275-3102. Department of Justice, Commercial Litigation Branch, Civil Division, Washington, DC 20530 (202) 514-3306. Office of Personnel Management, Office of Pay and Performance Management, 1900 E Street NW, Room 4351, Washington, DC 20415 (202) 606-2880.

Overview:

Federal Claims Collection Act. This Act, passed in 1966, was intended to give agencies new flexibility in pursuing and compromising claims and to reduce litigation by obviating the need to refer many cases for collection to the General Accounting Office or the Department of Justice. It requires each agency to attempt collection of all government "claims" for money or property arising out of the agency's activities. The Act, as amended by Pub. L. No. 101-552, authorizes compromise of most non-fraudulent claims that do not exceed $100,000 (or more in the discretion of the Attorney General) (exclusive of interest) and termination of collection activities on such claims the debtor appears unable to pay or when collection costs are likely to exceed the amount recovered. Agency authority under the Act is to be exercised pursuant to regulations promulgated by the head of an agency and in conformity with standards prescribed jointly by the Attorney General and the Comptroller General (§3711(e)). (See Appendix for collection standards.)

Debt Collection Act. Concerned over the mounting billions in delinquent debt owed to the government, including defaulted student, veterans, and small business loans, in 1982 Congress amended the Claims Collection Act, Privacy Act, and other statutes to give agencies new collection tools. Prior to the Debt Collection Act, offset against the salary of federal employees under 5 U.S.C. §5514 was limited to the recovery of erroneous payments. The Debt Collection Act expanded this authority to include general debts owed to the United States. Salary offset is now authorized in amounts up to 15 percent of an employee's disposable pay for a given pay period, unless the employee consents to a larger amount. (Salary offset under other statutes applicable in specific contexts, such as 5 U.S.C. §5522(c), was not affected.) Also, for the first time, the Debt Collection Act provided a statutory basis for administrative offset against debtors generally, with certain exemptions (31 U.S.C. §3716). The Debt Collection Act prescribes procedural safeguards, including notice and an opportunity for a hearing, for salary offset (§5514(a)(2)) and for administrative offset (§3716(a)), although the procedures are somewhat different. Under either situation (5 U.S.C. §5514 or 31 U.S.C. §3716), offset may be made where an agency holds funds payable to a person indebted either to that or to another agency. The Act makes it clear that the statute of limitations for initiating legal action (28 U.S.C. §2415) does not apply to administrative offset, but prohibits administrative offset to collection claims that have been outstanding for more than 10 years.

In addition, agencies have the authority to:

- Require loan applicants to furnish their social security numbers, permitting better review of credit backgrounds;

- Assess interest, penalties and administrative costs on overdue debts, and waive them in appropriate cases;

- Assess the costs of processing some delinquent claims;

- Contract with private collection agencies to collect unpaid debts;

- Report delinquent debtors to credit reporting agencies, which the Act exempts from Privacy Act restrictions ordinarily applicable to government contractors; and

- Facilitate collection by disclosing, pursuant to specified protections, mailing addresses and otherwise private information about debtors.

Debtors may be entitled to protections under laws other than the Debt Collection Act. For example, if an agency makes use of a consumer reporting agency, the consumer reporting agency must comply with the Fair Credit Reporting Act, 15 U.S.C. §§1681 et seq. (31 U.S.C. §3711(f)(1)(E)(iii)). If the agency uses a private debt collector, the collector must comply with the Fair Debt Collection Practices Act, 15 U.S.C. §§1692 et seq. (31 U.S.C. §3718(a)(2)(B)).

The Attorney General and Comptroller General's preexisting joint claims collection standards for agencies were modified in 1984 in an effort to implement the Debt Collection Act and to revise and update the standards generally. (See Appendix.) Pursuant to Executive Orders 11,609 and 12,107, the standard-setting authority with respect to offsets of federal employees' salaries under 5 U.S.C. §5514 has been delegated to the Office of Personnel Management. (See Appendix for OPM's regulations.)

Coverage. The Claims and Debt Collection Acts apply to amounts owing on account of loans insured or guaranteed by the U.S. and all other amounts due from fees, duties, leases, rents, royalties, services, sales, overpayments, fines, penalties, damages, interests, taxes, and forfeitures. This would appear to include many cases of audit disallowances under grants and contracts. Most provisions of the Debt Collection Act do not apply to certain exempted debts, including those arising under the Internal Revenue

Code,[1] the Social Security Act, and the tariff laws. Independent of the Debt Collection Act, a few agencies such as the Department of Education and Department of Veterans Affairs have received authority, with slightly different restrictions, to contract with collection agencies (Pub. L. Nos. 96-466 and 96-374). A number of related statutes affect the government's rights to assert claims in various situations, including those of erroneous payments to employees.

The Debt Collection Act excludes state and local governments from the sections on administrative offset and interest (§3701(c)). The GAO-Justice standards take the position that the exclusion does not displace preexisting common law authority. Others contend that agencies created by statute have no such common law authority, and the scope of the exclusion remains a matter of some controversy.

Uncertainties have also arisen about the scope of the Debt Collection Act's salary offset provision, the relationship between the Act and the Contract Disputes Act, and how soon an agency may begin assessing interest and penalties while it reviews a disputed claim. The Debt and Claims Collection Acts nowhere distinguish between a "claim" and "debt," and appear to use the terms interchangeably. Their legislative histories shed little light on these questions. Agency practices in some important areas vary. For instance, some consider audit disallowances as debts falling under the Act (thus authorizing assessment of penalties and interest during the resolution process), while others (such as the Department of Health and Human Services) view audit appeals as preliminary matters not subject to the Debt Collection Act's procedures or the Claims Collection Act's settlement ceiling. The Conference has recommended some procedural guidelines for agency handling of audit disputes under grants (Recommendation 82-2). The Conference has also recommended some guidelines on debt collection through salary offset and administrative offsets under the Debt Collection Act, on routine adjustments of pay and on clarifying the Act's relation to other statutes affecting government claims. (Conference Recommendation 87-9.)

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[1] Administrative deductions from a federal employee's current salary to collect delinquent taxes are authorized, however, under a separate statute, 26 U.S.C. §6331. In addition, Congress has enacted separate legislation to authorize the offset of general debts against tax refunds. Pub. L. No. 98-369 (July 18, 1984), §2653, codified at 31 U.S.C. §3720A and 26 U.S.C. §§6402(d)-(g).

Legislative History:

Claims Collection Act. Companion claims collection bills, H.R. 13651 and S. 3143, were introduced in the 89th Congress in accordance with the recommendation of the Department of Justice. The House Committee on the Judiciary favorably reported out H.R. 13651 on May 16, 1966. The House passed this bill on June 6, 1966, after floor amendments were added to reduce the compromise limit from $20,000 to $5,000. The Senate Committee on the Judiciary reported favorably on H.R. 13651 on June 24, 1966, but favored reinstating the $20,000 limit. On June 27, 1966, the Senate approved the version endorsed by the Senate Judiciary Committee. This bill was passed by the House on July 11, 1966 and signed into law 8 days later. On November 15, 1990 a new compromise limit was set at $100,000 (excluding interest) or such higher amount as the Attorney General may from time to time prescribe. (See Pub. L. No. 101-552.)

Debt Collection Act. Much of the impetus behind the Act came from a series of GAO reports and the work of the Office of Management and Budget's Debt Collection Project. S. 1249 was introduced in early 1981 by Senator Percy, and referred sequentially to the Committee on Governmental Affairs and the Committee on Finance. The Committee on Governmental Affairs held two hearings on the bill in 1981 and, on July 17, 1981, ordered it reported with amendments. The Committee on Finance, concerned with tax-related provisions of the bill, favorably reported it with further amendments on December 3, 1981. The House bills (H.R. 4613 and H.R. 4614) received attention from several House committees, primarily the Judiciary Subcommittee on Administrative Law and Governmental Relations. H.R. 4613 was passed in lieu of the Senate bill--on September 30, 1982 in the House and October 1, 1982 in the Senate--after its language was amended to reflect much of the latter. It became law on October 25, 1982.

Source Note:

Beyond their legislative histories, commentary on these acts has been sparse. Jacqueline Leifer's *Implementation of the Federal Debt Collection Act of 1982*, a 1984 report to the Conference, surveys that statute, the implementing standards from GAO, Justice, and OPM, and major procedural issues as perceived by agencies, interested parties and the author. Resources are also available on agencies' handling of some kinds of government claims, like audit disallowances. GAO and the Department of Justice have issued a number of decisions and opinions interpreting various portions of the acts and the joint standards.

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3. House of Representatives Committee on the Judiciary, *Report to Accompany H.R. 13651*, Report No. 1533, 89th Cong., 2d Sess. (1966).

4. House of Representatives Committee on Ways and Means, *Report to Accompany H.R. 4613*, Report No. 496, 97th Cong., 2d Sess. (1982).

5. Senate Committee on Finance, *Report to Accompany S. 1249*, Report No. 287, 97th Cong., 1st Sess. (1982), *reprinted in* 1982 U.S. Code Cong. & Ad. News 3413.

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2. Administrative Conference of the U.S., Recommendation 87-9, *Dispute Procedures in Federal Debt Collection*, 1 CFR §305.87-9 (1992).

3. Leifer, *Implementation of the Federal Debt Collection Act of 1982*, Report to the Administrative Conference of the U.S., 1984 ACUS 899 (1985).

4. Office of Management and Budget, Debt Collection Project, *Report on Strengthening Federal Credit Management* (1981).

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8. U.S. General Accounting Office, Unresolved Issues Impede Federal Debt Collection Efforts--A Status Report, CD-80-1 (January 15, 1980).

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Agency for International Development	22 CFR § 213
Agriculture	7 CFR §3
Air Force	32 CFR §842
Coast Guard	33 CFR §25
Commerce	15 CFR §§21, 22
Commodity Credit Corporation	7 CFR §1403
Commodity Futures Trading Commission	17 §§CFR 141, 143
Consumer Product Safety Commission	16 CFR §1027
Defense	32 CFR §§90, 268
Defense Logistics Agency	32 CFR §1280
Education	34 CFR §§30, 31, 32
Energy	10 CFR §§1015, 1018
Environmental Protection Agency	40 CFR §13
Farmers Home Administration	7 CFR §§1951, 1956
Federal Communications Commission	47 CFR §1
Federal Emergency Management Agency	44 CFR §11
Federal Mediation and Conciliation Service	29 CFR §1450
Fiscal Service	31 CFR §390
Food and Nutrition Service	7 CFR §272
General Services Administration	41 CFR §§105-55, 105-56
Health and Human Services	45 CFR §§30, 31
Housing and Urban Development	24 CFR §17
Interstate Commerce Commission	49 CFR §1021
Justice	28 CFR §11
Labor	29 CFR §§2, 20
Merit Systems Protection Board	5 CFR §1210
National Aeronautics and Space Administration	14 CFR §1261
National Endowment for the Arts	45 CFR §1150
National Endowment for the Humanities	45 CFR §§1177, 1179
Navy	32 CFR §757
Nuclear Regulatory Commission	10 CFR §15
Office of Personnel Management	5 CFR §§179, 831, 841, 845, 550
Panama Canal Commission	35 CFR §256
Peace Corps	22 CFR §309

Postal Service	39 CFR §§961, 966
Railroad Retirement Board	20 CFR §§200, 361, 366
Selective Service System	32 CFR §1697
Small Business Administration	13 CFR Part 140
Social Security Administration	20 CFR §410
State	22 CFR §§34, 139
Transportation	49 CFR §§89, 92
Treasury	31 CFR §5
United States Information Agency	22 CFR §512
Urban Mass Transportation Administration	49 CFR §603
Veterans Affairs	38 CFR §1

Appendix:

1. Federal Claims and Debt Collection Acts, 5 U.S.C. §§552a (b) and (m) and 5514; 18 U.S.C. §1114; 26 U.S.C. §§6103, 7213; 28 U.S.C. §2415(i); 31 U.S.C. §§3701, 3711, 3716-3719 (1988).
2. U.S. General Accounting Office/U.S. Department of Justice, Federal Claims Collection Standards, 4 CFR Parts 101-105, 49 Fed. Reg. 8889 (March 9, 1984).
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Claims and Debt Collection Acts

Title 5, U.S. Code

§552a. Records Maintained on Individuals

* * * *

(b) Conditions of Disclosure.

No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be--

(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;

(2) required under section 552 of this title;

(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;

(4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13;

(5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

(6) to the National Archives and Records Administration as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Archivist of the United States or the designee of the Archivist to determine whether the record has such value;

(7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;

(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;

(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

(10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting Office;

(11) pursuant to the order of a court of competent jurisdiction; or

(12) to a consumer reporting agency in accordance with section 3711(f) of title 31.

* * * *

(m)(1) Government Contractors.

When an agency provides by a contract for the operation by or on behalf of the agency of a system of records to accomplish an agency function, the agency shall, consistent with its authority, cause the requirements of this section to be applied to such system. For purposes of subsection (i) of this section any such contractor and any employee of such contractor, if such contract is agreed to on or after the effective date of this section, shall be considered to be an employee of an agency.

(2) A consumer reporting agency to which a record is disclosed under section 3711(f) of title 31 shall not be considered a contractor for the purposes of this section.

* * * *

§5514. Installment deduction for indebtedness to the United States

(a)(1) When the head of an agency or his designee determines that an employee, member of the Armed Forces or Reserve of the Armed Forces, is indebted to the United States for debts to which the United States is entitled to be repaid at the time of the determination by the head of an agency or his designee, or is notified of such a debt by the head of another agency or his designee the amount of indebtedness may be collected in monthly installments, or at officially established pay intervals, by deduction from the current pay account of the individual. The deductions may be made from basic pay, special pay, incentive pay, retired pay, retainer pay, or, in the case of an individual not entitled to basic pay, other authorized pay. The amount deducted for any period may not exceed 15 percent of disposable pay, except that a greater percentage may be deducted upon the written consent of the individual involved. If the individual retires or resigns, or if his employment or period of active duty otherwise ends, before collection of the amount of the indebtedness is completed, deduction shall be made from subsequent payments of any nature due the individual from the agency concerned.

(2) Except as provided in paragraph (3) of this subsection, prior to initiating any proceedings under paragraph (1) of this subsection to collect any indebtedness of an individual, the head of the agency holding the debt or his designee, shall provide the individual with--

(A) a minimum of thirty days written notice, informing such individual of the nature and amount of the indebtedness determined by such agency to be due, the intention of the agency to initiate proceedings to collect the debt through deductions from pay, and an explanation of the rights of the individual under this subsection;

(B) an opportunity to inspect and copy Government records relating to the debt;

(C) an opportunity to enter into a written agreement with the agency, under terms agreeable to the head of the agency or his designee, to establish a schedule for the repayment of the debt; and

(D) an opportunity for a hearing on the determination of the agency concerning the existence or the amount of the debt, and in the case of an individual whose repayment schedule is established other than by a written agreement pursuant to subparagraph (C), concerning the terms of the repayment schedule.

A hearing, described in subparagraph (D), shall be provided if the individual, on or before the fifteenth day following receipt of the notice described in subparagraph (A), and in accordance with such procedures as the head of the agency may prescribe, files a petition requesting such a hearing. The timely filing of a petition for hearing shall stay the commencement of collection proceedings. A hearing under subparagraph (D) may not be conducted by an individual under the supervision or control of the head of the agency, except that nothing in this sentence shall be construed to prohibit the appointment of an administrative law judge. The hearing official shall issue a final decision at the earliest practicable date, but not later than sixty days after the filing of the petition requesting the hearing.

(3) The collection of any amount under this section shall be in accordance with the standards promulgated pursuant to sections 3711 and 3716-3718 of title 31 or in accordance with any other statutory authority for the collection of claims of the United States or any agency thereof.

(4) For purposes of this subsection--

(A) "disposable pay" means that part of pay of any individual remaining after the deduction from those earnings of any amounts required by law to be withheld; and

(B) "agency" includes the United States Postal Service and the Postal Rate Commission.

(b)(1) The head of each agency shall prescribe regulations, subject to the approval of the President, to carry out this section and section 3530(d) of title 31. Regulations prescribed by the Secretaries of the militarydepartments shall be uniform for the military services insofar as practicable.

(2) For purposes of section 7117(a) of this title, no regulation prescribed to carry out subsection (a)(2) of this section shall be considered to be a Government-wide rule or regulation.

(c) Subsection (a) of this section does not modify existing statutes which provide for forfeiture of pay or allowances. This section and section 3530(d) of title 31 do not repeal, modify, or amend section 4837(d) or 9837(d) of title 10 or section 1007(b), (c) of title 37.

(Pub. L. No. 89-554, Sept. 6, 1966, 80 Stat. 477; Pub. L. No. 96-54, §2(a)(2), Aug. 14, 1979, 93 Stat. 381; Pub. L. No. 97-258, §3(a)(12), Sept. 13, 1982, 96 Stat. 1063; Pub. L. No. 97-365, §5, Oct. 25, 1982, 96 Stat. 1751; Pub. L. No. 97-452, §2(a)(2), Jan. 12, 1983, 96 Stat. 2478; Pub. L. No. 98-216, §3(a)(4), Feb. 14, 1984, 98 Stat. 6.)

* * * *

Title 18, U.S. Code

§1114. Protection of officers and employees of the United States

Whoever kills or attempts to kill any judge of the United States, any United States Attorney, any Assistant United States Attorney, or any United States marshal or deputy marshal or person employed to assist such marshal or deputy marshal, any officer or employee of the Federal Bureau of Investigation of the Department of Justice, any officer or employee of the Postal Service, any officer or employee of the Secret Service or of the Drug Enforcement Administration, any officer or member of the United States Capitol Police, any member of the Coast Guard, any employee of the Coast Guard assigned to perform investigative, inspection or law enforcement functions, any officer or employee of any United States penal or correctional institution, any officer, employee or agent of the customs or of the internal revenue or any person assisting him in the execution of his duties, any immigration officer, any officer or employee of the Department of Agriculture or of the Department of the Interior designated by the Secretary of Agriculture or the Secretary of the Interior to enforce any Act of Congress for the protection, preservation, or restoration of game and other wild birds and animals, any employee of the Department of Agriculture designated by the Secretary of Agriculture to carry out any law or regulation, or to perform any function in connection with any Federal or State program or any program of Puerto Rico, Guam, the Virgin Islands or any other commonwealth, territory, or possession of the United States, or the District of Columbia, for the control or eradication or prevention of the introduction or dissemination of animal diseases, any officer or employee of the National Park Service, any civilian official or employee of the Army Corps of Engineers assigned to perform investigations, inspections, law or regulatory enforcement functions, or field-level real estate functions, any officer or employee of, or assigned to duty in, the field service of the Bureau of Land Management, or any officer or employee of the Indian field service of the United States, or any officer or employee of the National Aeronautics and Space Administration directed to guard and protect property of the United States under the administration and control of the National Aeronautics and Space Administration, any security officer of the Department of State or the Foreign Service, or any officer or employee of the Department of Education, the Department of Health and Human Services, the Consumer Product Safety Commission, Interstate Commerce Commission, the Department of Commerce, or of the Department of Labor or of the Department of the Interior or of the Department of Agriculture assigned to perform investigative, inspection, or law enforcement functions, or any officer or employee of the Federal Communications Commission performing investigative, inspection, or law enforcement functions, or any officer or employee of the Department of Veterans Affairs assigned to perform investigative or law enforcement functions, or any United States probation or pretrial services officer, or any United States magistrate, or any officer or employee of any department or agency within the Intelligence Community (as defined in section 3.4(F) of Executive Order 12333, December 8, 1981, or successor orders) not already covered under the terms of this section, any attorney, liquidator, examiner, claim agent, or other employee of the Federal Deposit Insurance Corporation, the Comptroller of the Currency, the Office of

Thrift Supervision, the Federal Housing Finance Board, the Resolution Trust Corporation, the Board of Governors of the Federal Reserve System, any Federal Reserve bank, or the National Credit Union Administration, or any other officer, agency, or employee of the United States designated for coverage under this section in regulations issued by the Attorney General engaged in or on account of the performance of his official duties, or any officer or employee of the United States or any agency thereof designated to collect or compromise a Federal claim in accordance with sections 3711 and 3716-3718 of title 31 or other statutory authority shall be punished as provided under sections 1111 and 1112 of this title, except that any such person who is found guilty of attempted murder shall be imprisoned for not more than twenty years.

(June 25, 1948, ch. 645, 62 Stat. 756; May 24, 1949, ch. 139, §24, 63 Stat. 93; Oct. 31, 1951, ch. 655, §28, 65 Stat. 721; June 27, 1952, ch. 477, title IV, §402(c), 66 Stat. 276; July 29, 1958, Pub. L. No. 85-568, title III, §304(d), 72 Stat. 434; July 2, 1962, Pub. L. No. 87-518, §10, 76 Stat. 132; Aug. 27, 1964, Pub. L. No. 88-493, §3, 78 Stat. 610; July 15, 1965, Pub. L. No. 89-74, §8(b), 79 Stat. 234; Aug. 2, 1968, Pub. L. No. 90-449, §2, 82 Stat. 611; Aug. 12, 1970, Pub. L. No. 91-375, §6(j)(9), 84 Stat. 777; Oct. 27, 1970, Pub. L. No. 91-513, title II, §701(i)(1), 84 Stat. 1282; Dec. 29, 1970, Pub. L. No. 91-596, §17(h)(1), 84 Stat. 1607; Oct. 26, 1974, Pub. L. No. 93-481, §5, 88 Stat. 1456; May 11, 1976, Pub. L. No. 94-284, §18, 90 Stat. 514; Oct. 21, 1976, Pub. L. No. 94-582, §16, 90 Stat. 2883; Aug. 3, 1977, Pub. L. No. 95-87, title VII, §704, 91 Stat. 520; Nov. 8, 1978, Pub. L. No. 95-616, §3(j)(2), 92 Stat. 3112; Nov. 10, 1978, Pub. L. No. 95-630, title III, §307, 92 Stat. 3677; July 1, 1980, Pub. L. No. 96-296, §26(c), 94 Stat. 819; Oct. 17, 1980, Pub. L. No. 96-466, title VII, §704, 94 Stat. 2216; Dec. 29, 1981, Pub. L. No. 97-143, §1(b), 95 Stat. 1724; Sept. 13, 1982, Pub. L. No. 97-259, title I, §128, 96 Stat. 1099; Oct. 25, 1982, Pub. L. No. 97-365, §6, 96 Stat. 1752; Jan. 12, 1983, Pub. L. No. 97-452, §2(b), 96 Stat. 2478; July 30, 1983, Pub. L. No. 98-63, title I, §101, 97 Stat. 313; Oct. 12, 1984, Pub. L. No. 98-473, title II, §1012, 98 Stat. 2142; Oct. 30, 1984, Pub. L. No. 98-557, §17(c), 98 Stat. 2868; Nov. 18, 1988, Pub. L. No. 100-690, title VII, §7026, 102 Stat. 4397; Aug. 9, 1989, Pub. L. No. 101-73, title IX, §962(a)(6), 103 Stat. 502; Nov. 29, 1990, Pub. L. No. 101-647, title XII, §1205(h), title XVI, §1606, title XXXV, §3535, 104 Stat. 4831, 4843, 4925; June 13, 1991, Pub. L. No. 102-54, §13(f)(2), 105 Stat. 275.)

* * * *

Title 26, U.S. Code

§6103. Confidentiality and disclosure of returns and return information

(a) General rule

Returns and return information shall be confidential, and except as authorized by this title--

(1) no officer or employee of the United States,

(2) no officer or employee of any State, any local child support enforcement agency, or any local agency administering a program listed in subsection (l)(7)(D) who has or had access to returns or return information under this section, and

(3) no other person (or officer or employee thereof) who has or had access to returns or return information under subsection (e)(1)(D)(iii), (l)(12), paragraph (2) or (4)(B) of subsection (m), or subsection (n),

shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section. For purposes of this subsection, the term "officer or employee" includes a former officer or employee.

* * * *

(m) Disclosure of taxpayer identity information

(1) Tax refunds

The Secretary may disclose taxpayer identity information to the press and other media for purposes of notifying persons entitled to tax refunds when the Secretary, after reasonable effort and lapse of time, has been unable to locate such persons.

(2) Federal claims

(A) In general

Except as provided in subparagraph (B), the Secretary may, upon written request, disclose the mailing address of a taxpayer for use by officers, employees, or agents of a Federal agency for purposes of locating such taxpayer to collect or compromise a Federal claim against the taxpayer in accordance with sections 3711, 3717, and 3718 of title 31.

(B) Special rule for consumer reporting agency

In the case of an agent of a Federal agency which is a consumer reporting agency (within the meaning of section 603(f) of the Fair Credit Reporting Act (15 U.S.C. 1681a(f))), the mailing address of a taxpayer may be disclosed to such agent under subparagraph (A) only for the purpose of allowing such agent to prepare a commercial credit report on the taxpayer for use by such Federal agency in accordance with sections 3711, 3717, and 3718 of title 31.

(3) National Institute for Occupational Safety and Health

Upon written request, the Secretary may disclose the mailing address of taxpayers to officers and employees of the National Institute for Occupational Safety and Health solely for the purpose of locating individuals who are, or may have been, exposed to occupational hazards in order to determine the status of their health or to inform them of the possible need for medical care and treatment.

(4) Individuals who have defaulted on student loans administered by the Department of Education

(A) In general

Upon written request by the Secretary of Education, the Secretary may disclose the mailing address of any taxpayer who has defaulted on a loan--

(i) made under part B or E of title IV of the Higher Education Act of 1965, or

(ii) made pursuant to section 3(a)(1) of the Migration and Refugee Assistance Act of 1962 to a student at an institution of higher education,

for use only by officers, employees, or agents of the Department of Education for purposes of locating such taxpayer for purposes of collecting such loan.

(B) Disclosure to educational institutions, etc.

Any mailing address disclosed under subparagraph (A)(i) may be disclosed by the Secretary of Education to--

(i) any lender, or any State or nonprofit guarantee agency, which is participating under part B of title IV of the Higher Education Act of 1965, or

(ii) any educational institution with which the Secretary of Education has an agreement under part E of title IV of such Act,

for use only by officers, employees, or agents of such lender, guarantee agency, or institution whose duties relate to the collection of student loans for purposes of locating individuals who have defaulted on student loans made under such loan programs for purposes of collecting such loans.

(5) Individuals who have defaulted on student loans administered by the Department of Health and Human Services

(A) In general

Upon written request by the Secretary of Health and Human Services, the Secretary may disclose the mailing address of any taxpayer who has defaulted on a loan made under part C of title VII of the Public Health Service Act or under subpart II of part B of title VIII of such Act, for use only by officers, employees, or agents of the Department of Health and Human Services for purposes of locating such taxpayer for purposes of collecting such loan.

(B) Disclosure to schools and eligible lenders

Any mailing address disclosed under subparagraph (A) may be disclosed by the Secretary of Health and Human Services to--

(i) any school with which the Secretary of Health and Human Services has an agreement under subpart II of part C of title VII of the Public Health Service Act or subpart II of part B of title VIII of such Act, or

(ii) any eligible lender (within the meaning of section 737(4) of such Act) participating under subpart I of part C of title VII of such Act,

for use only by officers, employees, or agents of such school or eligible lender whose duties relate to the collection of student loans for purposes of locating individuals who have defaulted on student loans made under such subparts for the purposes of collecting such loans.

(6) Blood Donor Locator Service

(A) In general

Upon written request pursuant to section 1141 of the Social Security Act, the Secretary shall disclose the mailing address of taxpayers to officers and employees of the Blood Donor Locator Service in the Department of Health and Human Services.

(B) Restriction on disclosure

The Secretary shall disclose return information under subparagraph (A) only for purposes of, and to the extent necessary in, assisting under the Blood Donor Locator Service authorized persons (as defined in section 1141(h)(1) of the Social Security Act) in locating blood donors who, as indicated by donated blood or products derived therefrom or by the history of the subsequent use of such blood or blood products, have or may have the virus for acquired immune deficiency syndrome, in order to inform such donors of the possible need for medical care and treatment.

(C) Safeguards

The Secretary shall destroy all related blood donor records (as defined in section 1141(h)(2) of the Social Security Act) in the possession of the Department of the Treasury upon completion of their use in making the disclosure required under subparagraph (A), so as to make such records undisclosable.

(7) Social security account statement furnished by Social Security Administration

Upon written request by the Commissioner of Social Security, the Secretary may disclose the mailing address of any taxpayer who is entitled to receive a social security account statement pursuant to section 1143(c) of the Social Security Act, for use only by officers, employees or agents of the Social Security Administration for purposes of mailing such statement to such taxpayer.

* * * *

§7213. Unauthorized disclosure of information

(a) Returns and return information

(1) Federal employees and other persons

It shall be unlawful for any officer or employee of the United States or any person described in section 6103(n) (or an officer or employee of any such person), or any former officer or employee, willfully to disclose to any person, except as authorized in this title, any return or return information (as defined in section 6103(b)). Any violation of this paragraph shall be a felony punishable upon conviction by a fine in any amount not exceeding $5,000, or imprisonment of not more than 5 years, or both, together with the costs of prosecution, and if such offense is committed by any officer or employee of the United States, he shall, in addition to any other punishment, be dismissed from office or discharged from employment upon conviction for such offense.

(2) State and other employees

It shall be unlawful for any person (not described in paragraph (1)) willfully to disclose to any person, except as authorized in this title, any return or return information (as defined in section 6103(b)) acquired by him or another person under subsection (d), (i)(3)(B)(i), (l)(6), (7), (8), (9), (10), or (12), or (m)(2), (4), (6), or (7) of section 6103. Any violation ofthis paragraph shall be a felony punishable by a fine in any amount not exceeding $5,000, or imprisonment of not more than 5 years, or both, together with the costs of prosecution.

(3) Other persons

It shall be unlawful for any person to whom any return or return information (as defined in section 6103(b)) is disclosed in a manner unauthorized by this title thereafter willfully to print or publish in any manner not provided by law any such return or return information. Any violation of this paragraph shall be a felony punishable by a fine in any amount not exceeding $5,000, or imprisonment of not more than 5 years, or both, together with the costs of prosecution.

(4) Solicitation

It shall be unlawful for any person willfully to offer any item of material value in exchange for any return or return information (as defined in section 6103(b)) and to receive as a result of such solicitation any such return or return information. Any violation of this paragraph shall be a felony punishable by a fine in any amount not exceeding $5,000, or imprisonment of not more than 5 years, or both, together with the costs of prosecution.

(5) Shareholders

It shall be unlawful for any person to whom a return or return information (as defined in section 6103(b)) is disclosed pursuant to the provisions of section 6103(e)(1)(D)(iii) willfully to disclose such return or return information in any manner not provided by law. Any violation of this paragraph shall be a felony punishable by a fine in any amount not to exceed $5,000, or imprisonment of not more than 5 years, or both, together with the costs of prosecution.

(b) Disclosure of operations of manufacturer or producer

Any officer or employee of the United States who divulges or makes known in any manner whatever not provided by law to any person the operations, style of work, or apparatus of any manufacturer or producer visited by him in the discharge of his official duties shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution; and the offender shall be dismissed from office or discharged from employment.

(c) Disclosures by certain delegates of Secretary

All provisions of law relating to the disclosure of information, and all provisions of law relating to penalties for unauthorized disclosure of information, which are applicable in respect of any function under this title when performed by an officer or employee of the Treasury Department are likewise applicable in respect of such function when performed by any person who is a "delegate" within the meaning of section 7701(a)(12)(B).

(d) Cross references

(1) Penalties for disclosure of information by preparers of returns

For penalty for disclosure or use of information by preparers of returns, see section 7216.

(2) Penalties for disclosure of confidential information

For penalties for disclosure of confidential information by any officer or employee of the United States or any department or agency thereof, see 18 U.S.C. 1905.

(Aug. 16, 1954, ch. 736, 68A Stat. 855; Sept. 2, 1958, Pub. L. No. 85-866, title I, §90(c), 72 Stat. 1666; Sept. 13, 1960, Pub. L. No. 86-778, title I, §103(s), 74 Stat. 940; Oct. 4, 1976, Pub. L. No. 94-455, title XII, §1202(d), (h)(3), 90 Stat. 1686, 1688; Nov. 6, 1978, Pub. L. No. 95-600, title VII, §701(bb)(1)(C), (6), 92 Stat. 2922, 2923; May 26, 1980, Pub. L. No. 96-249, title I, §127(a)(2)(D), 94 Stat. 366; June 9, 1980, Pub. L. No. 96-265, title IV, §408(a)(2)(D), 94 Stat. 468, as amended Dec. 28, 1980, Pub. L. No. 96-611, §11(a)(2)(B)(iv), 94 Stat. 3574; Dec. 5, 1980, Pub. L. No. 96-499, title III, §302(b), 94 Stat. 2604; Dec. 28, 1980, Pub. L. No. 96-611, §11(a)(4)(A), 94 Stat. 3574; Sept. 3, 1982, Pub. L. No. 97-248, title III, §356(b)(2), 96 Stat. 645; Oct. 25, 1982, Pub. L. No. 97-365, §8(c)(2), 96 Stat. 1754; July 18, 1984, Pub. L. No. 98-369, div. A, title IV, §453(b)(4), div. B, title VI, §2653(b)(4), 98 Stat. 820, 1156; Aug. 16, 1984, Pub. L. No. 98-378, §21(f)(5), 98 Stat. 1326; Oct. 13, 1988, Pub. L. No. 100-485, title VII, §701(b)(2)(C), 102 Stat. 2426; Nov. 10, 1988, Pub. L. No. 100-647, title VIII, §8008(c)(2)(B), 102 Stat. 3787; Dec. 19, 1989, Pub. L. No. 101-239, title VI, §6202(a)(1)(C), 103 Stat. 2228; Nov. 5, 1990, Pub. L. No. 101-508, title V, §5111(b)(3), 104 Stat. 1388-273.)

* * * *

Title 28, U.S. Code

§2415. Time for commencing actions brought by the United States

(a) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later: Provided , That in the event of later partial payment or written acknowledgment of debt, the right of action shall be deemed to accrue again at the time of each such payment or acknowledgment: Provided further, That an action for money damages brought by the United States for or on behalf of a recognized tribe, band or group of American Indians shall not be barred unless the complaint is filed more than six years and ninety days after the right of action accrued: Provided further , That an action for money damages which accrued on the date of enactment of this Act in accordance with subsection (g) brought by the United States for or on behalf of a recognized tribe, band, or group of American Indians, or on behalf of an individual Indian whose land is held in trust or restricted status, shall not be barred unless the complaint is filed sixty days after the date of publication of the list required by section 4(c) of the Indian Claims Limitation Act of 1982: Provided, That, for those claims that are on either of the two lists published pursuant to the Indian Claims Limitation Act of 1982, any right of action shall be barred unless the complaint is filed within (1) one year after the Secretary of the Interior has published in the Federal Register a notice rejecting such claim or (2) three years after the date the Secretary of the Interior has submitted legislation or legislative report to Congress to resolve such claim or more than two years after a final decision has been rendered in applicable administrative proceedings required by contract or by law, whichever is later.

(b) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon a tort shall be barred unless the complaint is filed within three years after the right of action first accrues: Provided , That an action to recover damages resulting from a trespass on lands of the United States; an action to recover damages resulting from fire to such lands; an action to recover for diversion of money paid under a grant program; and an action for conversion of property of the United States may be brought within six years after the right of action accrues, except that such actions for or on behalf of a recognized tribe, band or group of American Indians, including actions relating to allotted trust or restricted Indian lands, may be brought within six years and ninety days after the right of action accrues, except that such actions for or on behalf of a recognized tribe, band, or group of American Indians, including actions relating to allotted trust or restricted Indian lands, or on behalf of an individual Indian whose land is held in trust or restricted status which accrued on the date of enactment of this Act in accordance with subsection (g) may be brought on or before sixty days after the date of the publication of the list required by section 4(c) of the Indian Claims Limitation Act of 1982: Provided, That, for those claims that are on either of the two lists published pursuant to the Indian Claims Limitation Act of 1982, any right of action shall be barred unless the complaint is filed within (1) one year after the Secretary of the Interior has published in the Federal Register a notice rejecting such claim or (2) three years after the Secretary of the Interior has submitted legislation or legislative report to Congress to resolve such claim.

(c) Nothing herein shall be deemed to limit the time for bringing an action to establish the title to, or right of possession of, real or personal property.

(d) Subject to the provisions of section 2416 of this title and except as otherwise provided by Congress, every action for the recovery of money erroneously paid to or on behalf of any civilian employee of any agency of the United States or to or on behalf of any member or dependent of any member of the uniformed services of the United States, incident to the employment or services of such employee or member, shall be barred unless the complaint is filed within six years after the right of action accrues: Provided, That in the event of later partial payment or written acknowledgment of debt, the right of action shall be deemed to accrue again at the time of each such payment or acknowledgment.

(e) In the event that any action to which this section applies is timely brought and is thereafter dismissed without prejudice, the action may be recommenced within one year after such dismissal, regardless of whether the action would otherwise then be barred by this section. In any action so recommenced the defendant shall not be barred from interposing any claim which would not have been barred in the original action.

(f) The provisions of this section shall not prevent the assertion, in an action against the United States or an officer or agency thereof, of any claim of the United States or an officer or agency thereof against an opposing party, a co-party, or a third party that arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. A claim of the United States or an officer or agency thereof that does not arise out of the transaction or occurrence that is the subject matter of the opposing party's claim may, if time-barred, be asserted only by way of offset and may be allowed in an amount not to exceed the amount of the opposing party's recovery.

(g) Any right of action subject to the provisions of this section which accrued prior to the date of enactment of this Act shall, for purposes of this section, be deemed to have accrued on the date of enactment of this Act.

(h) Nothing in this Act shall apply to actions brought under the Internal Revenue Code or incidental to the collection of taxes imposed by the United States.

(i) The provisions of this section shall not prevent the United States or an officer or agency thereof from collecting any claim of the United States by means of administrative offset, in accordance with section 3716 of title 31.

(Added Pub. L. No. 89-505, §1, July 18, 1966, 80 Stat. 304, and amended Pub. L. No. 92-353, July 18, 1972, 86 Stat. 499; Pub. L. No. 92-485, Oct. 13, 1972, 86 Stat. 803; Pub. L. No. 95-64, July 11, 1977, 91 Stat. 268; Pub. L. No. 95-103, Aug. 15, 1977, 91 Stat. 842; Pub. L. No. 96-217, §1, Mar. 27, 1980, 94 Stat. 126; Pub. L. No. 97-365, §9, Oct. 25, 1982, 96 Stat. 1754; Pub. L. No. 97-394, title I, §2, Dec. 30, 1982, 96 Stat. 1976; Pub. L. No. 97-452, §2(d)(2), Jan. 12, 1983, 96 Stat. 2478; Pub. L. No. 98-250, §4(a), Apr. 3, 1984, 98 Stat. 118.)

* * * *

Title 31, U.S. Code

§3701. Definitions and application

(a) In this chapter–

(1) "administrative offset" means withholding money payable by the United States Government to, or held by the Government for, a person to satisfy a debt the person owes the Government.

(2) "calendar quarter" means a 3-month period beginning on January 1, April 1, July 1, or October 1.

(3) "consumer reporting agency" means–

(A) a consumer reporting agency as that term is defined in section 603(f) of the Fair Credit Reporting Act (15 U.S.C. 1681a(f)); or

(B) a person that, for money or on a cooperative basis, regularly–

(i) gets information on consumers to give the information to a consumer reporting agency; or

(ii) serves as a marketing agent under an arrangement allowing a third party to get the information from a consumer reporting agency.

(4) "executive or legislative agency" means a department, agency, or instrumentality in the executive or legislative branch of the Government.

(5) "military department" means the Departments of the Army, Navy, and Air Force.

(6) "system of records" has the same meaning given that term in section 552a(a)(5) of title 5.

(7) "uniformed services" means the Army, Navy, Air Force, Marine Corps, Coast Guard, Commissioned Corps of the National Oceanic and Atmospheric Administration, and Commissioned Corps of the Public Health Service.

(b) In subchapter II of this chapter, "claim" includes amounts owing on account of loans insured or guaranteed by the Government and other amounts due the Government.

(c) In sections 3716 and 3717 of this title, "person" does not include an agency of the United States Government, of a State government, or of a unit of general local government.

(d) Sections 3711(f) and 3716-3719 of this title do not apply to a claim or debt under, or to an amount payable under, the Internal Revenue Code of 1986 (26 U.S.C. 1 et seq.), the Social Security Act (42 U.S.C. 301 et seq.), or the tariff laws of the United States.
(Pub. L. No. 97-258, Sept. 13, 1982, 96 Stat. 970; Pub. L. No. 97-452, §1(13)(A), Jan. 12, 1983, 96 Stat. 2469; Pub. L. No. 99-514, §2, Oct. 22, 1986, 100 Stat. 2095.)

Short Title of 1986 Amendment

Pub. L. No. 99-562, §1, Oct. 27, 1986, 100 Stat. 3153, provided that: "This Act [enacting sections 3732 and 3733 of this title and amending sections 3729 to 3731 of this title and section 287 of Title 18, Crimes and Criminal Procedure] may be cited as the `False Claims Amendments Act of 1986'."

United States Senate as Legislative Agency; Regulations Promulgated by Secretary of Senate

Pub. L. No. 101-163, title I, §11, Nov. 21, 1989, 103 Stat. 1046, provided that:

"(a) For purposes of subchapters I and II of chapter 37 of title 31, United States Code (relating to claims of or against the United States Government), the United States Senate shall be considered to be a legislative agency (as defined in section 3701(a)(4) of such title), and the Secretary of the Senate shall be deemed to be the head of such legislative agency.

"(b) Regulations prescribed by the Secretary of the Senate pursuant to section 3716 of title 31, United States Code, shall not become effective until they are approved by the Senate Committee on Rules and Administration."

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* * * *

§3711. Collection and compromise

(a) The head of an executive or legislative agency--

(1) shall try to collect a claim of the United States Government for money or property arising out of the activities of, or referred to, the agency;

(2) may compromise a claim of the Government of not more than $100,000 (excluding interest) or such higher amount as the Attorney General may from time to time prescribe that has not been referred to another executive or legislative agency for further collection action; and

(3) may suspend or end collection action on a claim referred to in clause (2) of this subsection when it appears that no person liable on the claim has the present or prospective ability to pay a significant amount of the claim or the cost of collecting the claim is likely to be more than the amount recovered.

(b) The Comptroller General has the same authority that the head of the agency has under subsection (a) of this section when the claim is referred to the Comptroller General for further collection action. Only the Comptroller General may compromise a claim arising out of an exception the Comptroller General makes in the account of an accountable official.

(c)(1) The head of an executive or legislative agency may not act under subsection (a)(2) or (3) of this section on a claim that appears to be fraudulent, false, or misrepresented by a party with an interest in the claim, or that is based on conduct in violation of the antitrust laws.

(2) The Secretary of Transportation may not compromise for less than $250 a penalty under section 6 of the Act of March 2, 1893 (45 U.S.C. 6), section 4 of the Act of April 14, 1910 (45 U.S.C. 13), section 9 of the Act of February 17, 1911 (45 U.S.C. 34), and section 25(h) of the Interstate Commerce Act (49 App. U.S.C. 26(h)).

(d) A compromise under this section is final and conclusive unless gotten by fraud, misrepresentation, presenting a false claim, or mutual mistake of fact. An accountable official is not liable for an amount paid or for the value of property lost or damaged if the amount or value is not recovered because of a compromise under this section.

(e) The head of an executive or legislative agency acts under--

(1) regulations prescribed by the head of the agency; and

(2) standards that the Attorney General and the Comptroller General may prescribe jointly.

(f)(1) When trying to collect a claim of the Government under a law except the Internal Revenue Code of 1986 (26 U.S.C. 1 et seq.), the head of an executive or legislative agency may disclose to a consumer reporting agency information from a system of records that an individual is responsible for a claim if--

(A) notice required by section 552a(e)(4) of title 5 indicates that information in the system may be disclosed to a consumer reporting agency;

(B) the head of the agency has reviewed the claim and decided that the claim is valid and overdue;

(C) the head of the agency has notified the individual in writing--

(i) that payment of the claim is overdue;

(ii) that, within not less than 60 days after sending the notice, the head of the agency intends to disclose to a consumer reporting agency that the individual is responsible for the claim;

(iii) of the specific information to be disclosed to the consumer reporting agency; and

(iv) of the rights the individual has to a complete explanation of the claim, to dispute information in the records of the agency about the claim, and to administrative repeal or review of the claim;

(D) the individual has not--

(i) repaid or agreed to repay the claim under a written repayment plan that the individual has signed and the head of the agency has agreed to; or

(ii) filed for review of the claim under paragraph (2) of this subsection;

(E) the head of the agency has established procedures to--

(i) disclose promptly, to each consumer reporting agency to which the original disclosure was made, a substantial change in the condition or amount of the claim;

(ii) verify or correct promptly information about the claim on request of a consumer reporting agency for verification of information disclosed; and

(iii) get satisfactory assurances from each consumer reporting agency that the agency is complying with all laws of the United States related to providing consumer credit information; and

(F) the information disclosed to the consumer reporting agency is limited to--

(i) information necessary to establish the identity of the individual, including name, address, and taxpayer identification number;

(ii) the amount, status, and history of the claim; and

(iii) the agency or program under which the claim arose.

(2) Before disclosing information to a consumer reporting agency under paragraph (1) of this subsection and at other times allowed by law, the head of an executive or legislative agency shall provide, on request of an individual alleged by the agency to be responsible for the claim, for a review of the obligation of the individual, including an opportunity for reconsideration of the initial decision on the claim.

(3) Before disclosing information to a consumer reporting agency under paragraph (1) of this subsection, the head of an executive or legislative agency shall take reasonable action to locate an individual for whom the head of the agency does not have a current address to send the notice under paragraph (1)(C). (Pub. L. No. 97-258, Sept. 13, 1982, 96 Stat. 971; Pub. L. No. 97-452, §1(15), Jan. 12, 1983, 96 Stat. 2470; Pub. L. No. 98-216, §1(5), Feb. 14, 1984, 98 Stat.

4; Pub. L. No. 99-514, §2, Oct. 22, 1986, 100 Stat. 2095; Pub. L. No. 101-552, §8(b), Nov. 15, 1990, 104 Stat. 2746.)

Existing Agency Authority To Litigate, Settle, Compromise, or Close Claims

Pub. L. No. 89-508, §4, July 19, 1966, 80 Stat. 309, provided that: "Nothing in this Act [now this section] shall increase or diminish the existing authority of the head of an agency to litigate claims, or diminish his existing authority to settle, compromise, or close claims."

§3712. Time limitations for presenting certain claims of the Government

(a) Claims Over Forged or Unauthorized Endorsements.

(1) Period for claims. If the Secretary of the Treasury determines that a Treasury check has been paid over a forged or unauthorized endorsement, the Secretary may reclaim the amount of such check from the presenting bank or any other endorser that has breached its guarantee of endorsements prior to

(A) the end of the 1-year period beginning on the date of payment; or

(B) the expiration of the 180-day period beginning on the close of the period described in subparagraph (A) if a timely claim is received under section 3702.

(2) Civil actions. (A) Except as provided in subparagraph (B), the United States may bring a civil action to enforce the liability of an endorser, transferor, depository, or fiscal agent on a forged or unauthorized signature or endorsement on, or a change in, a check or warrant issued by the Secretary of the Treasury, the United States Postal Service, or any disbursing official or agent not later than 1 year after a check or warrant is presented to the drawee for payment.

(B) If the United States has given an endorser written notice of a claim against the endorser within the time allowed by subparagraph (A), the 1-year period for bringing a civil action on that claim under subparagraph (A) shall be extended by 3 years.

(3) Effect on agency authority. Nothing in this subsection shall be construed to limit the authority of any agency under subchapter II of chapter 37 of this title.

(b) Notwithstanding subsection (a) of this section, a civil action may be brought within 2 years after the claim is discovered when an endorser, transferor, depositary, or fiscal agent fraudulently conceals the claim from an officer or employee of the Government entitled to bring the civil action.

(c) The Comptroller General shall credit the appropriate account of the Treasury for the amount of a check or warrant for which a civil action cannot be brought because notice was not given within the time required under subsection (a) of this section if the failure to give notice was not the result of negligence of the Secretary.

(d) The Government waives all claims against a person arising from dual pay from the Government if the dual pay is not reported to the Comptroller General for collection within 6 years from the last date of a period of dual pay.

(Pub. L. No. 97-258, Sept. 13, 1982, 96 Stat. 971; Pub. L. No. 100-86, title X, §1004(a), Aug. 10, 1987, 101 Stat. 659.)

§3716. Administrative offset

(a) After trying to collect a claim from a person under section 3711(a) of this title, the head of an executive or legislative agency may collect the claim by administrative offset. The head of the agency may collect by administrative offset only after giving the debtor--

(1) written notice of the type and amount of the claim, the intention of the head of the agency to collect the claim by administrative offset, and an explanation of the rights of the debtor under this section;

(2) an opportunity to inspect and copy the records of the agency related to the claim;

(3) an opportunity for a review within the agency of the decision of the agency related to the claim; and

(4) an opportunity to make a written agreement with the head of the agency to repay the amount of the claim.

(b) Before collecting a claim by administrative offset under subsection (a) of this section, the head of an executive or legislative agency must prescribe regulations on collecting by administrative offset based on--

(1) the best interests of the United States Government;

(2) the likelihood of collecting a claim by administrative offset; and

(3) for collecting a claim by administrative offset after the 6-year period for bringing a civil action on a claim under section 2415 of title 28 has expired, the cost effectiveness of leaving a claim unresolved for more than 6 years.

(c) This section does not apply--

(1) to a claim under this subchapter that has been outstanding for more than 10 years; or

(2) when a statute explicitly provides for or prohibits using administrative offset to collect the claim or type of claim involved.

(Added Pub. L. No. 97-452, §1(16)(A), Jan. 12, 1983, 96 Stat. 2471.)

§3717. Interest and penalty on claims

(a)(1) The head of an executive or legislative agency shall charge a minimum annual rate of interest on an outstanding debt on a United States Government claim owed by a person that is equal to the average investment rate for the Treasury tax and loan accounts for the 12-month period ending on September 30 of each year, rounded to the nearest whole percentage point. The Secretary of the Treasury shall publish the rate before November 1 of that year. The rate is effective on the first day of the next calendar quarter.

(2) The Secretary may change the rate of interest for a calendar quarter if the average investment rate for the 12-month period ending at the close of the prior calendar quarter, rounded to the nearest whole percentage point, is more or less than the existing published rate by 2 percentage points.

(b) Interest under subsection (a) of this section accrues from the date--

(1) on which notice is mailed after October 25, 1982, if notice was first mailed before October 25, 1982; or

(2) notice of the amount due is first mailed to the debtor at the most current address of the debtor available to the head of the executive or legislative agency, if notice is first mailed after October 24, 1982.

(c) The rate of interest charged under subsection (a) of this section--

(1) is the rate in effect on the date from which interest begins to accrue under subsection (b) of this section; and

(2) remains fixed at that rate for the duration of the indebtedness.

(d) Interest under subsection (a) of this section may not be charged if the amount due on the claim is paid within 30 days after the date from which interest accrues under subsection (b) of this section. The head of an executive or legislative agency may extend the 30-day period.

(e) The head of an executive or legislative agency shall assess on a claim owed by a person--

(1) a charge to cover the cost of processing and handling a delinquent claim; and

(2) a penalty charge of not more than 6 percent a year for failure to pay a part of a debt more than 90 days past due.

(f) Interest under subsection (a) of this section does not accrue on a charge assessed under subsection (e) of this section.

(g) This section does not apply--

(1) if a statute, regulation required by statute, loan agreement, or contract prohibits charging interest or assessing charges or explicitly fixes the interest or charges; and

(2) to a claim under a contract executed before October 25, 1982, that is in effect on October 25, 1982.

(h) In conformity with standards prescribed jointly by the Attorney General and the Comptroller General, the head of an executive or legislative agency may prescribe regulations identifying circumstances appropriate to waiving collection of interest and charges under subsections (a) and (e) of this section. A waiver under the regulations is deemed to be compliance with this section.
(Added Pub L. 97-452, §1(16)(A), Jan. 12, 1983, 96 Stat. 2472.)

§3718. Contracts for collection services

(a) Under conditions the head of an executive or legislative agency considers appropriate, the head of the agency may make a contract with a person for collection services to recover indebtedness owed the United States Government. The contract shall provide that--

(1) the head of the agency retains the authority to resolve a dispute, compromise a claim, end collection action, and refer a matter to the Attorney General to bring a civil action; and

(2) the person is subject to--

(A) section 552a of title 5, to the extent provided in section 552a(m); and

(B) laws and regulations of the United States Government and State governments related to debt collection practices.

(b)(1)(A) The Attorney General may make contracts retaining private counsel to furnish legal services, including representation in negotiation, compromise, settlement, and litigation, in the case of any claim of indebtedness owed the United States. Each such contract shall include such terms and conditions as the Attorney General considers necessary and appropriate, including a provision specifying the amount of the fee to be paid to the private counsel under such contract or the method for calculating that fee. The amount of the fee payable for legal services furnished under any such contract may not exceed the fee that counsel engaged in the private practice of law in the area or areas where the legal services are furnished typically charge clients for furnishing legal services in the collection of claims of indebtedness, as determined by the Attorney General, considering the amount, age, and nature of the indebtedness and whether the debtor is an individual or a business entity. If the Attorney General makes a contract for legal services to be furnished in any judicial district of the United States under the first sentence of this paragraph, the Attorney General shall use his best efforts to obtain, from among attorneys regularly engaged in the private practice of law in such district, at least four such contracts for legal services with private individuals or firms in such district. Nothing in this subparagraph shall relieve the Attorney General of the competition requirements set forth in title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251 and following).

(B) The Attorney General shall use his best efforts to enter into contracts under this paragraph with law firms owned and controlled by socially and economically disadvantaged individuals, so as to enable each agency to comply with paragraph (3).

(2) The head of an executive or legislative agency may, subject to the approval of the Attorney General, refer to a private counsel retained under paragraph (1) of this subsection claims of indebtedness owed the United States arising out of activities of that agency.

(3) Each agency shall use its best efforts to assure that not less than 10 percent of the amounts of all claims referred to private counsel by that agency under paragraph (2) are referred to law firms owned and controlled by socially and economically disadvantaged individuals. For purposes of this paragraph

(A) the term "law firm owned and controlled by socially and economically disadvantaged individuals" means a law firm that meets the requirements set forth in clauses (i) and (ii) of section 8(d)(3)(C) of the Small Business Act (15 U.S.C. 6376(d)(3)(C)(i) and (ii)) and regulations issued under those clauses; and

(B) "socially and economically disadvantaged individuals" shall be presumed to include these groups and individuals described in the last paragraph of section 8(d)(3)(C) of the Small Business Act.

(4) Notwithstanding sections 516, 518(b), 519, and 547(2) of title 28, a private counsel retained under paragraph (1) of this subsection may represent the United States in litigation in connection with legal services furnished pursuant to the contract entered into with that counsel under paragraph (1) of this subsection.

(5) A contract made with a private counsel under paragraph (1) of this subsection shall include

(A) a provision permitting the Attorney General to terminate either the contract or the private counsel's representation of the United States in particular cases if the Attorney General finds that such action is for the convenience of the Government;

(B) a provision stating that the head of the executive or legislative agency which refers a claim under the contract retains the authority to resolve a dispute regarding the claim, to compromise the claim, or to terminate a collection action on the claim; and

(C) a provision requiring the private counsel to transmit monthly to the Attorney General and the head of the executive or legislative agency referring a claim under the contract a report on the services relating to the claim rendered under the contract during the month and the progress made during the month in collecting the claim under the contract.

(6) Notwithstanding the fourth sentence of section 803(6) of the Fair Debt Collection Practices Act (15 U.S.C. 1692a(6)), a private counsel performing legal services pursuant to a contract made under paragraph (1) of this subsection shall be considered to be a debt collector for the purposes of such Act.

(7) Any counterclaim filed in any action to recover indebtedness owed the United States which is brought on behalf of the United States by private counsel retained under this subsection may not be asserted unless the counterclaim is served directly on the Attorney General or the United States Attorney for the judicial district in which, or embracing the place in which, the action is brought. Such service shall be made in accordance with the rules of procedure of the court in which the action is brought.

(c) The Attorney General shall transmit to the Congress an annual report on the activities of the Department of Justice to recover indebtedness owed the United States which was referred to the Department of Justice for collection. Each such report shall include a list, by agency, of

(1) the total number and amounts of claims which were referred for legal services to the Department of Justice and to private counsel under subsection (b) during the 1-year period covered by the report;

(2) the total number and amount of those claims referred for legal services to the Department of Justice which were collected or were not collected or otherwise resolved during the 1-year period covered by the report; and

(3) the total number and amount of those claims referred for legal services to private counsel under subsection (b)

(A) which were collected or were not collected or otherwise resolved during the 1-year period covered by the report;

(B) which were not collected or otherwise resolved under a contract terminated by the Attorney General during the 1-year period covered by the report; and

(C) on which the Attorney General terminated the private counsel's representation during the 1-year period covered by the report without terminating the contract with the private counsel under which the claims were referred.

(d) Notwithstanding section 3302(b) of this title, a contract under subsection (a) or (b) of this section may provide that a fee a person charges to recover indebtedness owed the United States Government is payable from the amount recovered.

(e) A contract under subsection (a) or (b) of this section is effective only to the extent and in the amount provided in an appropriation law. This limitation does not apply in the case of a contract that authorizes a person to collect a fee as provided in subsection (d) of this section.

(f) This section does not apply to the collection of debts under the Internal Revenue Code of 1986 (26 U.S.C. 1 et seq.).

(Added Pub. L. No. 97-452, §1(16)(A), Jan. 12, 1983, 96 Stat. 2473, and amended Pub. L. No. 98-167, Nov. 29, 1983, 97 Stat. 1104; Pub. L. No. 99-514, §2, Oct. 22, 1986, 100 Stat. 2095; Pub. L. No. 99-578, §1, Oct. 28, 1986, 100 Stat. 3305.)

§3719. Reports on debt collection activities

(a) In consultation with the Secretary of the Treasury and the Comptroller General, the Director of the Office of Management and Budget shall prescribe regulations requiring the head of each agency with outstanding debts to prepare and submit to the Director and the Secretary at least once each year a report summarizing the status of loans and accounts receivable managed by the head of the agency. The report shall contain--

(1) information on--

(A) the total amount of loans and accounts receivable owed the agency and when amounts owed the agency are due to be repaid;

(B) the total amount of receivables and number of claims at least 30 days past due;

(C) the total amount written off as actually uncollectible and the total amount allowed for uncollectible loans and accounts receivable;

(D) the rate of interest charged for overdue debts and the amount of interest charged and collected on debts;

(E) the total number of claims and the total amount collected; and

(F) the number and total amount of claims referred to the Attorney General for settlement and the number and total amount of claims the Attorney General settles;

(2) the information described in clause (1) of this subsection for each program or activity the head of the agency carries out; and

(3) other information the Director considers necessary to decide whether the head of the agency is acting aggressively to collect the claims of the agency.

(b) The Director shall analyze the reports submitted under subsection (a) of this section and shall report annually to Congress on the management of debt collection activities by the head of each agency, including the information provided the Director under subsection (a).

(Added Pub. L. No. 97-452, §1(16)(A), Jan. 12, 1983, 96 Stat. 2473.)

U.S. General Accounting Office/U.S. Department of Justice

Federal Claims Collection Standards
4 CFR Parts 101-105, 49 Fed. Reg. 8889 (March 9, 1984)

CHAPTER II—FEDERAL CLAIMS COLLECTION STANDARDS (GENERAL ACCOUNTING OFFICE—DEPARTMENT OF JUSTICE)

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PART 101—SCOPE OF STANDARDS

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AUTHORITY: 31 U.S.C. 3711.

SOURCE: 49 FR 8896, Mar. 9, 1984, unless otherwise noted.

§ 101.1 Prescription of standards.

The regulations in this chapter, issued jointly by the Comptroller General of the United States and the Attorney General of the United States under 31 U.S.C. 3711(e)(2), prescribe standards for the administrative collection, compromise, termination of agency collection, and the referral to the General Accounting Office, and to the Department of Justice for litigation, of civil claims as defined by 31 U.S.C. 3701(b), by the Federal Government for money or property. Additional guidance is contained in Title 4 of the General Accounting Office Policy and Procedures Manual for Guidance of Federal Agencies. Regulations prescribed by the head of an agency pursuant to 31 U.S.C. 3711(e)(1) will be reviewed by the General Accounting Office as a part of its audit of the agency's activities.

§ 101.2 Definitions.

(a) *Claim and debt.* For the purposes of these standards, the terms "claim" and "debt" are deemed synonymous and interchangeable. They refer to an amount of money or property which has been determined by an appropriate agency official to be owed to the United States from any person, organization, or entity, except another Federal agency.

(b) A debt is considered "delinquent" if it has not been paid by the date specified in the agency's initial written notification (§ 102.2 of this chapter) or applicable contractual agreement, unless other satisfactory payment arrangements have been made by that date, or if, at any time thereafter, the debtor fails to satisfy obligations under a payment agreement with the creditor agency.

(c) As used in this chapter, "referral for litigation" means referral to the Department of Justice for appropriate legal proceedings, unless the agency concerned has statutory authority for handling its own litigation.

(d) In this chapter, words in the plural form shall include the singular and vice versa; and words importing the masculine gender shall include the feminine and vice versa. The terms "includes" and "including" do not exclude matters not listed but which are in the same general class.

§ 101.3 Antitrust, fraud, tax, and interagency claims excluded.

(a) The standards in this chapter relating to compromise, suspension, and termination of collection action (Parts 103 and 104) do not apply to any claim based in whole or in part on conduct in violation of the antitrust laws, or to any claim as to which there is an indication of fraud, the presentation of a false claim, or misrepresentation on the part of the debtor or any other party having an interest in the claim. Only the Department of Justice has authority to compromise, suspend, or terminate collection action on such claims. The standards in this chapter relating to the administrative collection of claims (Part 102) do apply, but only to the extent authorized by the Department of Justice in a particular case. Upon identification of a claim of any of the types described in the first sentence of this paragraph, the agency involved should refer the matter promptly to the Department of Justice. At its discretion, the Department of Justice may return the claim to the forwarding agency for further handling in accordance with the regulations in this chapter.

(b) Tax claims, as to which differing exemptions, administrative considerations, enforcement considerations, and statutes apply, are also excluded from the coverage of this chapter.

(c) This chapter does not apply to claims between Federal agencies. Federal agencies should attempt to resolve interagency claims by negotiation. If the claim cannot be resolved by the agencies involved, it should be referred to the General Accounting Office.

§ 101.4 Compromise, waiver, or disposition under other statutes not precluded.

Nothing contained in this chapter is intended to preclude agency disposition of any claim under statutes and implementing regulations other than Subchapter II of Chapter 37 of Title 31 of the United States Code and these Standards, providing for the collection, compromise, termination of collection action, or waiver in whole or in part of such a claim. See, for example, the Federal Medical Care Recovery Act, 76 Stat. 593, 42 U.S.C. 2651 et seq., and applicable regulations, 28 CFR 43.1 et seq. In such cases, the laws and regulations which are specifically applicable to claims collection activities of a particular agency take precedence over this chapter. Except as provided in § 102.19 of this chapter (Exemptions), the standards set forth in this chapter should be followed in the disposition of civil claims by the Federal Government by collection, compromise, or termination of collection action (other than by waiver pursuant to other statutory authority) where neither the specific statute nor its implementing regulations establish standards governing such matters.

§ 101.5 Conversion claims.

The instructions contained in this chapter are directed primarily at the recovery of money on behalf of the United States and the circumstances in which Government claims may be disposed of for less than the full amount claimed. Nothing contained in this chapter is intended, however, to deter an agency from demanding the return of specific property or from demanding, in the alternative, either the return of the property or the payment of its value.

§ 101.6 Subdivision of claims not authorized.

Claims may not be subdivided to avoid the monetary ceiling established by 31 U.S.C. 3711(a)(2). A debtor's liability arising from a particular transaction or contract shall be considered a single claim in determining whether the claim is one of less than $20,000, exclusive of interest, penalties, and administrative costs, for purposes of compromise (§ 103.1 of this chapter) or suspension or termination of collection action (§ 104.1 of this chapter).

§ 101.7 Required administrative proceedings.

Nothing contained in this chapter is intended to require an agency to omit, foreclose, or duplicate administrative proceedings required by contract or other laws or regulations.

§ 101.8 Omissions not a defense.

The standards set forth in this chapter shall apply to the administrative handling of civil claims of the Federal Government for money or property but the failure of an agency to comply with any provision of this chapter shall not be available as a defense to any debtor.

PART 102—STANDARDS FOR THE ADMINISTRATIVE COLLECTION OF CLAIMS

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Sec.
102.20 Additional administrative collection action.

AUTHORITY: Subchapter II of Chapter 37 of Title 31, U. S. C. .

SOURCE: 49 FR 8897, Mar. 9, 1984, unless otherwise noted.

§ 102.1 Aggressive agency collection action.

(a) Each Federal agency shall take aggressive action, on a timely basis with effective followup, to collect all claims of the United States for money or property arising out of the activities of, or referred to, that agency in accordance with the standards set forth in this chapter. However, nothing contained in this chapter is intended to require the General Accounting Office or the Department of Justice to duplicate collection actions previously undertaken by any other agency, or to perform collection actions which should have been undertaken by any other agency in accordance with the standards set forth in this chapter.

(b) All agencies are expected to cooperate with one another in their debt collection activities.

§ 102.2 Demand for payment.

(a) Appropriate written demands shall be made promptly upon a debtor of the United States in terms which inform the debtor of the consequences of failure to cooperate. A total of three progressively stronger written demands at not more than 30-day intervals will normally be made unless a response to the first or second demand indicates that a further demand would be futile and the debtor's response does not require rebuttal. In determining the timing of demand letters, agencies should give due regard to the need to act promptly so that, as a general rule, if necessary to refer the debt to the Department of Justice for litigation, such referral can be made within one year of the agency's final determination of the fact and the amount of the debt. When necessary to protect the Government's interests (for example, to prevent the statute of limitations, 28 U.S.C. 2415, from expiring), written demand may be preceded by other appropriate actions under this chapter, including immediate referral for litigation.

(b) The initial demand letter should inform the debtor of: (1) The basis for the indebtedness and whatever rights the debtor may have to seek review within the agency; (2) the applicable standards for assessing interest, penalties, and administrative costs (§ 102.13); and (3) the date by which payment is to be made, which normally should be not more than 30 days from the date that the initial demand letter was mailed or hand-delivered. Agencies should exercise care to insure that demand letters are mailed or hand-delivered on the same day that they are actually dated. Apart from this, there is no prescribed format for the demand letters. Agencies should utilize demand letters and procedures that will lead to the earliest practicable determination of whether the debt can be resolved administratively or must be referred for litigation.

(c) As appropriate to the circumstances, agencies may consider including, either in the initial demand letter or in subsequent letters, such items as the agency's willingness to discuss alternative methods of payment, policies with respect to use of consumer reporting agencies (§ 102.5) and collection services (§ 102.6), the agency's intentions with respect to referral of the debt to the Department of Justice for litigation, and, depending on applicable statutory authority, the debtor's entitlement to consideration of waiver.

(d) Agencies should respond promptly to communications from the debtor, within 30 days whenever feasible, and should advise debtors who dispute the debt to furnish available evidence to support their contentions.

(e) If, either prior to the initiation of, at any time during, or after completion of the demand cycle, an agency determines to pursue offset, then the procedures specified in §§ 102.3, 102.4, or 5 U.S.C. 5514, as applicable, should be followed. The availability of funds for offset and the agency's determination to pursue it release the agency from the necessity of further compliance with paragraphs (a), (b), and (c) of this section. If the agency has not already sent the first demand letter, the agency's written notification of its intent to offset must give the debtor the opportunity to make voluntary payment, a requirement which will be satisfied by compliance with the notice requirements of §§ 102.3, 102.4, or 5 U.S.C. 5514.

§ 102.3 Collection by administrative offset.

(a) Collection by administrative offset will be undertaken in accordance with these standards and implementing regulations established by each agency on all claims which are liquidated or certain in amount in every instance in which such collection is determined to be feasible and not otherwise prohibited.

(1) For purposes of this section, the term "administrative offset" has the meaning provided in 31 U.S.C. 3716(a)(1).

(2) Whether collection by administrative offset is feasible is a determination to be made by the creditor agency on a case-by-case basis, in the exercise of sound discretion. Agencies should consider not only whether administrative offset can be accomplished, both practically and legally, but also whether offset is best suited to further and protect all of the Government's interests. In appropriate circumstances, agencies may give due consideration to the debtor's financial condition, and are not required to use offset in every instance in which there is an available source of funds. Agencies may also consider whether offset would tend to substantially interfere with or defeat the purposes of the program authorizing the payments against which offset is contemplated. For example, under a grant program in which payments are made in advance of the grantee's performance, offset will normally be inappropriate. This concept generally does not apply, however, where payment is in the form of reimbursement.

(b) Except as provided in § 101.4, this paragraph or § 102.4, the standards in this paragraph shall apply to the collection of debts by administrative offset under 31 U.S.C. 3716, some other statutory authority, or the common law.

(1) Agencies shall prescribe regulations for the exercise of administrative offset.

(2) Agency regulations required by paragraph (b)(1) of this section shall establish procedures for providing a debtor, before the offset is made, with appropriate procedural rights. Except as otherwise required by law, those regulations shall provide for: Written notice of the nature and amount of the debt, and the agency's intention to collect by offset; opportunity to inspect and copy agency records pertaining to the debt; opportunity to obtain review within the agency of the determination of indebtedness; and opportunity to enter into a written agreement with the agency to repay the debt. Agency regulations shall also establish procedures for making requests for offset to other agencies holding funds payable to the debtor, and for processing requests for offset that are received from other agencies.

(i) Agencies have discretion and should exercise sound judgment in determining whether to accept a repayment agreement in lieu of offset. The determination should balance the Government's interest in collecting the debt against fairness to the debtor. If the debt is delinquent and the debtor has not disputed its existence or amount, an agency should accept a repayment agreement in lieu of offset only if the debtor is able to establish that offset would result in undue financial hardship or would be against equity and good conscience.

(ii) In cases where the procedural requirements specified in paragraph (b)(2) of this section have previously been provided to the debtor in connection with the same debt under some other statutory or regulatory authority, such as pursuant to a notice of audit disallowance, the agency is not required to duplicate those requirements before taking administrative offset.

(3) Agencies may not initiate administrative offset to collect a debt under 31 U.S.C. 3716 more than 10 years after the Government's right to collect the debt first accrued, unless facts material to the Government's right to collect the debt were not known and could not reasonably have been known by the official or officials of the Government who were charged with the responsibility to discover and collect

such debts. When the debt first accrued is to be determined according to existing law regarding the accrual of debts, such as under 28 U.S.C. 2415.

(4) Agencies are not authorized by 31 U.S.C. 3716 to use administrative offset with respect to: (i) Debts owed by any State or local Government; (ii) debts arising under or payments made under the Social Security Act, the Internal Revenue Code of 1954, or the tariff laws of the United States; or (iii) any case in which collection of the type of debt involved by administrative offset is explicitly provided for or prohibited by another statute. However, unless otherwise provided by contract or law, debts or payments which are not subject to administrative offset under 31 U.S.C. 3716 may be collected by administrative offset under the common law or other applicable statutory authority.

(5) Agencies may effect administrative offset against a payment to be made to a debtor prior to the completion of the procedures required by paragraph (b)(2) of this section if: (i) Failure to take the offset would substantially prejudice the Government's ability to collect the debt, and (ii) the time before the payment is to be made does not reasonably permit the completion of those procedures. Such prior offset must be promptly followed by the completion of those procedures. Amounts recovered by offset but later found not to be owed to the Government shall be promptly refunded.

(c) Type of hearing or review: (1) For purposes of this section, whenever an agency is required to afford a debtor with a hearing or review within the agency, the agency shall provide the debtor with a reasonable opportunity for an oral hearing when: (i) An applicable statute authorizes or requires the agency to consider waiver of the indebtedness involved, the debtor requests waiver of the indebtedness, and the waiver determination turns on an issue of credibility or veracity; or (ii) the debtor requests reconsideration of the debt and the agency determines that the question of the indebtedness cannot be resolved by review of the documentary evidence, for example, when the validity of the debt turns on an issue of credibility or veracity. Unless otherwise required by law, an oral hearing under this section is not required to be a formal evidentiary-type hearing, although the agency should always carefully document all significant matters discussed at the hearing.

(2) This section does not require an oral hearing with respect to debt collection systems in which determinations of indebtedness or waiver rarely involve issues of credibility or veracity and the agency has determined that review of the written record is ordinarily an adequate means to correct prior mistakes. In administering such a system, the agency is not required to sift through all of the requests received in order to accord oral hearings in those few cases which may involve issues of credibility or veracity.

(3) In those cases where an oral hearing is not required by this section, the agency shall nevertheless accord the debtor a "paper hearing," that is, the agency will make its determination on the request for waiver or reconsideration based upon a review of the written record.

(d) Appropriate use should be made of the cooperative efforts of other agencies in effecting collection by administrative offset, including use of the Army Holdup List. Generally, agencies should not refuse to comply with requests from other agencies to initiate administrative offset to collect debts owed to the United States, unless the requesting agency has not complied with the applicable provisions of these standards or the offset would be otherwise contrary to law.

(e) Collection by offset against a judgment obtained by a debtor against the United States shall be accomplished in accordance with 31 U.S.C. 3728.

(f) Whenever the creditor agency is not the agency which is responsible for making the payment against which administrative offset is sought, the latter agency shall not initiate the requested offset until it has been provided by the creditor agency with an appropriate written certification that the debtor owes a debt (including the amount) and that the provisions of this section have been fully complied with.

(g) When collecting multiple debts by administrative offset, agencies should apply the recovered amounts to those debts in accordance with the best interests of the United States, as determined by the facts and circumstances of the particular case, paying special attention to applicable statutes of limitations.

§ 102.4 Administrative offset against amounts payable from Civil Service Retirement and Disability Fund.

(a) Unless otherwise prohibited by law, agencies may request that moneys which are due and payable to a debtor from the Civil Service Retirement and Disability Fund be administratively offset in reasonable amounts in order to collect in one full payment or a minimal number of payments debts owed to the United States by the debtor. Such requests shall be made to the appropriate officials of the Office of Personnel Management in accordance with such regulations as may be prescribed by the Director of that Office.

(b) When making a request for administrative offset under paragraph (a) of this section, an agency shall include a written certification that:

(1) The debtor owes the United States a debt, including the amount of the debt;

(2) The requesting agency has complied with the applicable statutes, regulations, and procedures of the Office of Personnel Management; and

(3) The requesting agency has complied with the requirements of § 102.3 of this part, including any required hearing or review.

(c) Once an agency decides to request administrative offset under paragraph (a) of this section, it should make the request as soon as practical after completion of the applicable procedures in order that the Office of Personnel Management may identify and "flag" the debtor's account in anticipation of the time when the debtor requests or becomes eligible to receive payments from the Fund. This will satisfy any requirement that offset be initiated prior to expiration of the applicable statute of limitations. At such time as the debtor makes a claim for payments from the Fund, if at least a year has elapsed since the offset request was originally made, the debtor should be permitted to offer a satisfactory repayment plan in lieu of offset upon establishing that changed financial circumstances would render the offset unjust.

(d) If the requesting agency collects part or all of the debt by other means before deductions are made or completed pursuant to paragraph (a) of this section, the agency shall act promptly to modify or terminate its request for offset under paragraph (a) of this section.

(e) This section does not require or authorize the Office of Personnel Management to review the merits of the requesting agency's determination with respect to the amount and validity of the debt, its determination as to waiver under an applicable statute, or its determination to provide or not provide an oral hearing.

§ 102.5 Use of consumer reporting agencies.

(a) Agencies shall develop and implement procedures for reporting delinquent debts to consumer reporting agencies. For purposes of this section, the term "consumer reporting agency" has the meaning provided in 31 U.S.C. 3701(a)(3).

(b) In developing procedures under paragraph (a) of this section, agencies must have due regard for compliance with the Privacy Act of 1974, as amended, 5 U.S.C. 552a. However, consumer reporting agencies themselves are not subject to the Privacy Act.

(c) Agency procedures developed under paragraph (a) of this section shall be consistent with the requirements of 31 U.S.C. 3711(f) and § 102.3(c) of this part.

§ 102.6 Contracting for collection services.

(a) All agencies have authority to contract for collection services to recover delinquent debts, provided that the following conditions are satisfied:

(1) The authority to resolve disputes, compromise claims, suspend or terminate collection action, and refer the matter for litigation (§ 105.1) must be retained by the agency;

(2) The contractor shall be subject to the Privacy Act of 1974, as amended, to the extent specified in 5 U.S.C. 552a(m), and to applicable Federal and State laws and regulations pertaining to debt collection practices, such as the Fair Debt Collection Practices Act, 15 U.S.C. 1692;

(3) The contractor must be required to account strictly for all amounts collected; and

(4) The contractor must agree to provide any data contained in its files relating to § 105.2(a) (1), (2), and (3) of this chapter upon returning an account to the creditor agency for subsequent referral to the Department of Justice for litigation.

(b) Funding of collection service contracts:

(1) An agency may fund a collection service contract on a fixed-fee basis, that is, payment of a fixed fee determined without regard to the amount actually collected under the contract. Payment of the fee under this type of contract must be charged to available agency appropriations.

(2) An agency may also fund a collection service contract on a contingent-fee basis, that is, by including a provision in the contract permitting the contractor to deduct its fee from amounts collected under the contract. The fee should be based on a percentage of the amount collected, consistent with prevailing commercial practice.

(3) An agency may enter into a contract under paragraph (b)(1) of this section only if and to the extent provided in advance in its appropriation act or other legislation, except that this requirement does not apply to the use of a revolving fund authorized by statute.

(4) Except as authorized under paragraph (b)(2) of this section, or unless otherwise specifically provided by law, agencies must deposit all amounts recovered under collection service contracts (or by agency employees on behalf of the agency) in the Treasury as miscellaneous receipts pursuant to 31 U.S.C. 3302.

§ 102.7 Personal interview with debtor.

Agencies will undertake personal interviews with their debtors whenever this is feasible, having regard for the amounts involved and the proximity of agency representatives to such debtors.

§ 102.8 Contact with debtor's employing agency.

When a debtor is employed by the Federal Government or is a member of the military establishment or the Coast Guard, and collection by offset cannot be accomplished in accordance with 5 U.S.C. 5514, the employing agency will be contacted for the purpose of arranging with the debtor for payment of the indebtedness by allotment or otherwise in accordance with section 206 of Executive Order 11222, May 8, 1965, 30 FR 6469.

§ 102.9 Suspension or revocation of license or eligibility.

Agencies seeking the collection of statutory penalties, forfeitures, or debts provided for as an enforcement aid or for compelling compliance should give serious consideration to the suspension or revocation of licenses or other privileges for any inexcusable, prolonged or repeated failure of a debtor to pay such a claim, and the debtor should be so advised. Any agency making, guaranteeing, insuring, acquiring, or participating in loans should give serious consideration to suspending or disqualifying any lender, contractor, broker, borrower or other debtor from doing further business with it or engaging in programs sponsored by it if such a debtor fails to pay its debts to the Government within a reasonable time, and the debtor should be so advised. The failure of any surety to honor its obligations in accordance with 31 U.S.C. 9305 is to be reported to the Treasury Department at once. Notification that a surety's certificate of authority to do business with the Federal Government has been revoked or forfeited by the Treasury Department will be forwarded by that Department to all interested agencies.

§ 102.10 Liquidation of collateral.

An agency holding security or collateral which may be liquidated and the proceeds applied on debts due it through the exercise of a power of sale in the security instrument or a nonjudicial foreclosure should do so by such procedures if the debtor fails to pay the debt within a reasonable time after demand, unless the cost of disposing of the collateral will be disproportionate to its value or special circumstances require judicial foreclosure. The agency should provide the debtor with reasonable notice of the sale, an accounting of any surplus proceeds, and any other procedures required by contract or law. Collection from other sources, including liquidation of security or collateral, is not a prerequisite to requiring payment by a surety or insurance concern unless such action is expressly required by statute or contract.

§ 102.11 Collection in installments.

(a) Whenever feasible, and except as otherwise provided by law, debts owed to the United States, together with interest, penalties, and administrative costs as required by § 102.13 of this part, should be collected in full in one lump sum. This is true whether the debt is being collected by administrative offset or by another method, including voluntary payment. However, if the debtor is financially unable to pay the indebtedness in one lump sum, payment may be accepted in regular installments. Agencies should obtain financial statements from debtors who represent that they are unable to pay the debt in one lump sum. Agencies which agree to accept payment in regular installments should obtain a legally enforceable written agreement from the debtor which specifies all of the terms of the arrangement and which contains a provision accelerating the debt in the event the debtor defaults. The size and frequency of installment payments should bear a reasonable relation to the size of the debt and the debtor's ability to pay. If possible, the installment payments should be sufficient in size and frequency to liquidate the Government's claim in not more than 3 years. Installment payments of less than $50 per month should be accepted only if justifiable on the grounds of financial hardship or for some other reasonable cause. An agency holding an unsecured claim for administrative collection should attempt to obtain an executed confess-judgment note, comparable to the Department of Justice Form USA-70a, from a debtor when the total amount of the deferred installments will exceed $750. Such notes may be sought when an unsecured obligation of a lesser amount is involved. When attempting to obtain confess-judgment notes, agencies should provide their debtors with written explanation of the consequences of signing the note, and should maintain documentation sufficient to demonstrate that the debtor has signed the note knowingly and voluntarily. Security for deferred payments other than a confess-judgment note may be accepted in appropriate cases. An agency may accept installment payments notwithstanding the refusal of a debtor to execute a confess-judgment note or to give other security, at the agency's option.

(b) If the debtor owes more than one debt and designates how a voluntary installment payment is to be applied as among those debts, that designation must be followed. If the debtor does not designate the application of the payment, agencies should apply payments to the various debts in accordance with the best interests of the United States, as determined by the facts and circumstances of the particular case, paying special attention to applicable statues of limitations.

§ 102.12 Exploration of compromise.

Agencies may attempt to effect compromise, preferably during the course of personal interviews, in accordance with the standards set forth in Part 103 of this chapter.

§ 102.13 Interest, penalties, and administrative costs.

(a) Except as provided in paragraphs (h) and (i) of this section, agencies shall assess interest, penalties, and administrative costs on debts owed to the United States pursuant to 31 U.S.C. 3717. Before assessing these charges, an agency must mail or hand-deliver a written notice to the debtor explaining the agency's requirements concerning the charges. (See § 102.2 of this part.)

(b) Interest shall accrue from the date on which notice of the debt and the interest requirements is first mailed or hand-delivered to the debtor (on or after October 25, 1982), using the most current address that is available to the agency. If an agency uses an "advance billing" procedure—that is, if it mails a bill before the debt is actually owed—it can include the required interest notification in the advance billing, but interest may not start to accrue before the debt is actually owed. Agencies should exercise care to insure that the notices required by this section are dated and mailed or hand-delivered on the same day.

(c) The rate of interest assessed shall be the rate of the current value of funds to the U.S. Treasury (*i.e.*, the Treasury tax and loan account rate), as prescribed and published by the Secretary of the Treasury in the FEDERAL REGISTER and the Treasury Fiscal Requirements Manual Bulletins annually or quarterly, in accordance with 31 U.S.C. 3717. An agency may assess a higher rate of interest if it reasonably determines that a higher rate is necessary to protect the interests of the United States. The rate of interest, as initially assessed, shall remain fixed for the duration of the indebtedness, except that where a debtor has defaulted on a repayment agreement and seeks to enter into a new agreement, the agency may set a new interest rate which reflects the current value of funds to the Treasury at the time the new agreement is executed. Interest should not be assessed on interest, penalties, or administrative costs required by this section. However, if the debtor defaults on a previous repayment agreement, charges which accrued but were not collected under the defaulted agreement shall be added to the principal to be paid under a new repayment agreement.

(d) An agency shall assess against a debtor charges to cover administrative costs incurred as a result of a delinquent debt,—that is, the additional costs incurred in processing and handling the debt because it became delinquent as defined in § 101.2(b) of this chapter. Calculation of administrative costs should be based upon actual costs incurred or upon cost analyses establishing an average of actual additional costs incurred by the agency in processing and handling claims against other debtors in similar stages of delinquency. Administrative costs may include costs incurred in obtaining a credit report or in using a private debt collector, to the extent they are attributable to delinquency.

(e) An agency shall assess a penalty charge, not to exceed 6 percent a year, on any portion of a debt that is delinquent as defined in § 101.2(b) of this chapter for more than 90 days. This charge need not be calculated until the 91st day of delinquency, but shall accrue from the date that the debt became delinquent.

(f) When a debt is paid in partial or installment payments, amounts received by the agency shall be applied first to outstanding penalty and administrative cost charges, second to accrued interest, and third to outstanding principal.

(g) An agency shall waive the collection of interest on the debt or any portion of the debt which is paid within 30 days after the date on which interest began to accrue. An agency may extend this 30-day period, on a case-by-case basis, if it reasonably determines that such action is appropriate. Also, an agency may waive, in whole or in part, the collection of interest, penalties, and/or administrative costs assessed under this section under the criteria specified in Part 103 of this chapter relating to the compromise of claims (without regard to the amount of the debt), or if the agency determines that collection of these charges would be against equity and good conscience or not in the best interests of the United States. Waiver under the first sentence of this paragraph (g) is mandatory. Under the second and third sentences, it may be exercised only in accordance with regulations issued by the agency identifying the standards and appropriate circumstances for waiver. Examples of situations which agencies may consider including in their interest waiver regulations are: (1) Waiver of interest pending consideration of a request for reconsideration, administrative review, or waiver of the underlying debt under a permissive statute, and (2) waiver of interest where the agency has accepted an installment plan under § 102.11 of this part, there is no indication of fault or lack of good faith on the part of the debtor, and the amount of interest is large enough in relation to the size of the installments that the debtor can reasonably afford to pay that the debt will never be repaid.

(h) Where a mandatory waiver or review statute applies, interest and related charges may not be assessed for those periods during which collection action must be suspended under § 104.2(c)(1) of this chapter.

(i) *Exemptions.* (1) The provisions of 31 U.S.C. 3717 do not apply: (i) To debts owed by any State or local government;

(ii) To debts arising under contracts which were executed prior to, and were in effect on (i.e., were not completed as of), October 25, 1982;

(iii) To debts where an applicable statute, regulation required by statute, loan agreement, or contract either prohibits such charges or explicitly fixes the charges that apply to the debts involved; or

(iv) To debts arising under the Social Security Act, the Internal Revenue Code of 1954, or the tariff laws of the United States.

(2) However, agencies are authorized to assess interest and related charges on debts which are not subject to 31 U.S.C. 3717 to the extent authorized under the common law or other applicable statutory authority.

§ 102.14 Analysis of costs.

Agency collection procedures should provide for periodic comparison of costs incurred and amounts collected. Data on costs and corresponding recovery rates for debts of different types and in various dollar ranges should be used to compare the cost effectiveness of alternative collection techniques, establish guidelines with respect to points at which costs of further collection efforts are likely to exceed recoveries, assist in evaluating offers in compromise, and establish minimum debt amounts below which collection efforts need not be taken. Cost and recovery data should also be useful in justifying adequate resources for an effective collection program, evaluating the feasibility and cost effectiveness of contracting for debt collection services under § 102.6, and determining appropriate charges for administrative costs under § 102.13(d).

§ 102.15 Documentation of administrative collection action.

All administrative collection action shall be documented and the bases for compromise, or for termination or suspension of collection action, should be set out in detail. Such documentation shall be retained in the appropriate claims file.

§ 102.16 Automation.

Agencies should automate their debt collection operations to the extent it is cost effective and feasible.

§ 102.17 Prevention of overpayments, delinquencies, and defaults.

Agencies should establish procedures to identify the causes of overpayments, delinquencies, and defaults and the corrective actions needed.

§ 102.18 Use and disclosure of mailing addresses.

(a) When attempting to locate a debtor in order to collect or compromise a debt under this chapter, an agency may send a written request to the Secretary of the Treasury (or designee) in order to obtain a debtor's mailing address from the records of the Internal Revenue Service.

(b) An agency may disclose a mailing address obtained under paragraph (a) of this section to other agents, including collection service contractors, in order to facilitate the collection or compromise of debts under this chapter, except that a mailing address may be disclosed to a consumer reporting agency only for the limited purpose of obtaining a commercial credit report on the particular taxpayer.

(c) Each agency shall ensure, by appropriate regulations and contract administration, that the agency and its agents, including consumer reporting agencies and collection service contractors, comply with the provisions of 26 U.S.C. 6103(p)(4) and applicable regulations of the Internal Revenue Service.

§ 102.19 Exemptions.

(a) The preceding sections of this part, to the extent they reflect remedies or procedures prescribed by the Debt Collection Act of 1982, such as administrative offset (§§ 102.3 and 102.4), use of consumer reporting agencies (§ 102.5), contracting for collection services (§ 102.6), and interest and related charges (§ 102.13), do not apply to debts arising under or payments made under the Internal Revenue Code of 1954, as amended (26 U.S.C. 1 *et seq.*), the Social Security Act (42 U.S.C. 301 *et seq.*), or the tariff laws of the United States. However, these remedies and procedures may still be authorized with respect to debts which are exempt from the purview of the Debt Collection Act of 1982, to the extent that they are authorized under some other statute or the common law.

(b) This section should not be construed as prohibiting use of these authorities or requirements when collecting debts owed by persons employed by agencies administering the laws cited in the preceding paragraph unless the debt "arose under" those laws.

§ 102.20 Additional administrative collection action.

Nothing contained in this chapter is intended to preclude the utilization of any other administrative remedy which may be available.

PART 103—STANDARDS FOR THE COMPROMISE OF CLAIMS

Sec.

103.1 Scope and application.
103.2 Inability to pay.
103.3 Litigative probabilities.
103.4 Cost of collecting claim.
103.5 Enforcement policy.
103.6 Joint and several liability.
103.7 Compromise for a combination of reasons.
103.8 Further review of compromise offers.
103.9 Restrictions.

AUTHORITY: 31 U.S.C. 3711.

SOURCE: 49 FR 8902, Mar. 9, 1984, unless otherwise noted.

§ 103.1 Scope and application.

(a) The standards set forth in this part apply to the compromise of claims pursuant to 31 U.S.C. 3711. The head of an agency may exercise such compromise authority with respect to claims for money or property arising out of the activities of that agency where the claim, exclusive of interest, penalties, and administrative costs, does not exceed $20,000, prior to the referral of such claims to the General Accounting Office, or to the Department of Justice for litigation. The Comptroller General may exercise such compromise authority with respect to claims referred to the General Accounting Office prior to their further referral for litigation. Only the Comptroller General may effect the compromise of a claim that arises out of an exception made by the General Accounting Office in the account of an accountable officer, including a claim against the payee, prior to its referral by that Office for litigation. Agency heads, including the Comptroller General, may designate officials within their respective agencies to exercise the authorities referred to in this section.

(b) When the claim, exclusive of interest, penalties, and administrative costs, exceeds $20,000, the authority to accept the compromise rests solely with the Department of Justice. The agency should evaluate the offer, using the factors set forth in this part. If the agency then wishes to accept the compromise, it must refer the matter to the Department of Justice, using the Claims Collection Litigation Report. See 4 CFR 105.2(b). Claims for which the gross amount is over $100,000 shall be referred to the Commercial Litigation Branch, Civil Division, Department of Justice, Washington, D.C. 20530. Claims for which the gross original amount is $100,000 or less shall be referred to the United States Attorney in whose judicial district the debtor can be found. The referral should specify the reasons for the agency's recommendation. Justice Department approval is not required if the agency wishes to reject the compromise offer.

§ 103.2 Inability to pay.

(a) A claim may be compromised pursuant to this part if the Government cannot collect the full amount because of: (1) The debtor's inability to pay the full amount within a reasonable time, or (2) the refusal of the debtor to pay the claim in full and the Government's inability to enforce collection in full within a reasonable time by enforced collection proceedings.

(b) In determining the debtor's inability to pay, the following factors, among others, may be considered:

(1) Age and health of the debtor;

(2) Present and potential income;

(3) Inheritance prospects;

(4) The possibility that assets have been concealed or improperly transferred by the debtor; and

(5) The availability of assets or income which may be realized by enforced collection proceedings.

(c) The agency should give consideration to the applicable exemptions available to the debtor under State and Federal law in determining the Government's ability to enforce collection. Uncertainty as to the price which collateral or other property will bring at forced sale may properly be considered in determining the Government's ability to enforce collection. A compromise effected under this section should be for an amount which bears a reasonable relation to the amount which can be recovered by enforced collection procedures, having regard for the exemptions available to the debtor and the time which collection will take.

(d) Compromises payable in installments are to be discouraged. However, if payment of a compromise by installments is necessary, a legally enforceable agreement for the reinstatement of the prior indebtedness less sums paid thereon and acceleration of the balance due upon default in the payment of any installment should be obtained, together with security in the manner set forth in § 102.11 of this chapter, in every case in which this is possible.

(e) If the agency's files do not contain reasonably up-to-date credit information as a basis for assessing a compromise proposal, such information may be obtained from the individual debtor by obtaining a statement executed under penalty of perjury showing the debtor's assets and liabilities, income and expenses. Forms such as Department of Justice Form OBD-500 or OBD-500B may be used for this purpose. Similar data may be obtained from corporate debtors using a form such as Department of Justice Form OBD-500C or by resort to balance sheets and such additional data as seems required.

§ 103.3 Litigative probabilities.

A claim may be compromised pursuant to this part if there is a real doubt concerning the Government's ability to prove its case in court for the full amount claimed, either because of the legal issues involved or a *bona fide* dispute as to the facts. The amount accepted in compromise in such cases should fairly reflect the probability of prevailing on the legal question involved, the probabilities with respect to full or partial recovery of a judgment, paying due regard to the availability of witnesses and other evidentiary support for the Government claim, and related pragmatic considerations. In determining the litigative risks involved, proportionate weight should be given to the probable amount of court costs and attorney fees pursuant to the Equal Access to Justice Act which may be assessed against the Government if it is unsuccessful in litigation. See 28 U.S.C. 2412.

§ 103.4 Cost of collecting claim.

A claim may be compromised pursuant to this part if the cost of collecting the claim does not justify the enforced collection of the full amount. The amount accepted in compromise in such cases may reflect an appropriate discount for the administrative and litigative costs of collection, paying heed to the time which it will take to effect collection. Costs of collecting may be a substantial factor in the settlement of small claims, but normally will not carry great weight in the settlement of large claims. In determining whether the cost of collecting justifies enforced collection of the full amount, it is legitimate to consider the positive effect that enforced collection of some claims may have on the collection of other claims. Since debtors are more likely to pay when first requested to do so if an agency has a policy of vigorous collection of all claims, the fact that the cost of collection of any one claim may exceed the amount of the claim does not necessarily mean that the claim should be compromised. The practical benefits of vigorous collection of a small claim may include a demonstration to other debtors that resistance to payment is not likely to succeed.

§ 103.5 Enforcement policy.

Statutory penalties, forfeitures, or debts established as an aid to enforcement and to compel compliance may be compromised pursuant to this part if the agency's enforcement policy in terms of deterrence and securing compliance, both present and future, will be adequately served by acceptance of the sum to be agreed upon. Mere accidental or technical violations may be dealt with less severely than willful and substantial violations.

§ 103.6 Joint and several liability.

When two or more debtors are jointly and severally liable, collection action will not be withheld against one such debtor until the other or others pay their proportionate shares. The agency should not attempt to allocate the burden of paying such claims as between the debtors but should proceed to liquidate the indebtedness as quickly as possible. Care should be taken that a compromise agreement with one such debtor does not release the agency's claim against the remaining debtors. The amount of a compromise with one such debtor shall not be considered a precedent or as morally binding in determining the amount which will be required from other debtors jointly and severally liable on the claim.

§ 103.7 Compromise for a combination of reasons.

A claim may be compromised for one or for more than one of the reasons authorized in this part.

§ 103.8 Further review of compromise offers.

If an agency holds a debtor's firm written offer of compromise which is substantial in amount and the agency is uncertain as to whether the offer should be accepted, it may refer the offer, the supporting data, and particulars concerning the claim to the General Accounting Office or to the Department of Justice. The General Accounting Office or the Department of Justice may act upon such an offer or return it to the agency with instructions or advice.

§ 103.9 Restrictions.

Neither a percentage of a debtor's profits nor stock in a debtor corporation will be accepted in compromise of a claim. In negotiating a compromise with a business concern, consideration should be given to requiring a waiver of the tax-loss-carry-forward and tax-loss-carry-back rights of the debtor.

PART 104—STANDARDS FOR SUSPENDING OR TERMINATING COLLECTION ACTION

Sec.
104.1 Scope and application.
104.2 Suspension of collection activity.
104.3 Termination of collection activity.
104.4 Transfer of claims.

AUTHORITY: 31 U.S.C. 3711(a)(3).

SOURCE: 49 FR 8903, Mar. 9, 1984, unless otherwise noted.

§ 104.1 Scope and application.

(a) The standards set forth in this part apply to the suspension or termination of collection action pursuant to 31 U.S.C. 3711(a)(3) on claims which do not exceed $20,000, exclusive of interest, penalties, and administrative costs, after deducting the amount of partial payments or collections, if any. The head of an agency (or designee) may suspend or terminate collection action under this part with respect to claims for money or property arising out of activities of that agency prior to the referral of such claims to the General Accounting Office or to the Department of Justice for litigation. The Comptroller General (or designee) may exercise such authority with respect to claims referred to the General Accounting Office prior to their further referral for litigation.

(b) If, after deducting the amount of partial payments or collections, if any, a claim exceeds $20,000, exclusive of interest, penalties, and administrative costs, the authority to suspend or terminate rests solely with the Department of Justice. If the agency thinks suspension or termination may be appropriate, it should evaluate the matter, using the factors set forth in this part. if the agency then concludes that suspension or termination is appropriate, it must refer the matter to the Department of Justice, using the Claims Collection Litigation Report. See 4 CFR 105.2(b). The referral should specify the reasons for the agency's recommendation. If the agency decides not to suspend or terminate collection action on the claim, Justice Department approval is not required. If an agency determines that its claim is plainly erroneous or clearly without legal merit, it may terminate collection action regardless of the amount involved, without the need for Department of Justice concurrence.

§ 104.2 Suspension of collection activity.

(a) *Inability to locate debtor.* Collection action may be suspended temporarily on a claim when the debtor cannot be located after diligent effort and there is reason to believe that future collection action may be sufficiently productive to justify periodic review and action on the claim, with due consideration for the size and amount which may be realized thereon. The following sources may be of assistance in locating missing debtors: Telephone directories; city directories; postmasters; drivers' license records; automobile title and registration records; state and local governmental agencies; the Internal Revenue Service (§ 102.18 of this chapter); other Federal agencies; employers, relatives, friends; credit agency skip locate reports, and credit bureaus. Suspension as to a particular debtor should not defer the early liquidation of security for the debt. Every reasonable effort should be made to locate missing debtors sufficiently in advance of the bar of the applicable statute of limitations, such as 28 U.S.C. 2415, to permit the timely filing of suit if such action is warranted. If the missing debtor has signed a confess-judgment note and is in default, referral of the note for the entry of judgment should not be delayed because of the debtor's missing status.

(b) *Financial condition of debtor.* Collection action may also be suspended temporarily on a claim when the debtor owns no substantial equity in realty or personal property and is unable to make payments on the Government's claim or effect a compromise at the time but the debtor's future prospects justify retention of the claim for periodic review and action, and:

(1) The applicable statute of limitations has been tolled or started running anew; or

(2) Future collection can be effected by offset, notwithstanding the statute of limitations, with due regard to the 10-year limitation prescribed by 31 U.S.C. 3716(c)(1); or

(3) The debtor agrees to pay interest on the amount of the debt on which collection action will be temporarily suspended, and such temporary suspension is likely to enhance the debtor's ability to fully pay the principal amount of the debt with interest at a later date.

(c) *Request for waiver or administrative review.* (1) If the statute under which waiver or administrative review is sought is "mandatory," that is, if it prohibits the agency from collecting the debt prior to the agency's consideration of the request for waiver or review (see *Califano* v. *Yamasaki*, 422 U.S. 682 (1979)), then collection action must be suspended until either: (i) The agency has considered the request for waiver/review, or (ii) the applicable time limit for making the waiver/review request, as prescribed in the agency's regulations, has expired and the debtor, upon proper notice, has not made such a request.

(2) If the applicable waiver/review statute is "permissive," that is, if it does not require all requests for waiver/review to be considered, and if it does not prohibit collection action pending consideration of a waiver/

review request (for example, 5 U.S.C. 5584), collection action may be suspended pending agency action on a waiver/review request based upon appropriate consideration, on a case-by-case basis, as to whether:

(i) There is a reasonable possibility that waiver will be granted, or that the debt (in whole or in part) will be found not owing from the debtor;

(ii) The Government's interests would be protected, if suspension were granted, by reasonable assurance that the debt could be recovered if the debtor does not prevail; and

(iii) Collection of the debt will cause undue hardship.

(3) If the applicable statutes and regulations would not authorize refund by the agency to the debtor of amounts collected prior to agency consideration of the debtor's waiver/review request in the event the agency acts favorably on it, collection action should ordinarily be suspended, without regard to the factors specified in paragraph (c)(2) of this section, unless it appears clear, based on the request and the surrounding circumstances, that the request is frivolous and was made primarily to delay collection.

§ 104.3 Termination of collection activity.

The head of an agency (or designee) may terminate collection activity and consider the agency's file on the claim closed under the following standards:

(a) *Inability to collect any substantial amount.* Collection action may be terminated on a claim when it becomes clear that the Government cannot collect or enforce collection of any significant sum from the debtor, having due regard for the judicial remedies available to the Government, the debtor's future financial prospects, and the exemptions available to the debtor under State and Federal law. In determining the debtor's inability to pay, the following factors, among others, may be considered: Age and health of the debtor; present and potential income; inheritance prospects; the possibility that assets have been concealed or improperly transferred by the debtor; the availability of assets or income which may be realized by enforced collection proceedings.

(b) *Inability to locate debtor.* Collection action may be terminated on a claim when the debtor cannot be located, and either: (1) There is no security remaining to be liquidated, or (2) the applicable statute of limitations has run and the prospects of collecting by offset, notwithstanding the bar of the statute of limitations, are too remote to justify retention of the claim.

(c) *Cost will exceed recovery.* Collection action may be terminated on a claim when it is likely that the cost of further collection action will exceed the amount recoverable thereby.

(d) *Claim legally without merit.* Collection action should be terminated immediately on a claim whenever it is determined that the claim is legally without merit.

(e) *Claim cannot be substantiated by evidence.* Collection action should be terminated when it is determined that the evidence necessary to prove the claim cannot be produced or the necessary witnesses are unavailable and efforts to induce voluntary payment are unavailing.

§ 104.4 Transfer of claims.

When an agency has doubt as to whether collection action should be suspended or terminated on a claim, it may refer the claim to the General Accounting Office for advice. When a significant enforcement policy is involved in reducing a statutory penalty or forfeiture to judgment, or recovery of a judgment is a prerequisite to the imposition of administrative sanctions, such as the suspension or revocation of a license or the privilege of participating in a Government sponsored program, an agency may refer such a claim for litigation even though termination of collection activity might otherwise be given consideration under § 104.3 (a) or (c). Claims on which an agency holds a judgment by assignment or otherwise will be referred to the Department of Justice for further action if renewal of the judgment lien or enforced collection proceedings are justified under the criteria discussed in this part, unless the agency concerned has statutory authority for handling its own litigation.

PART 105—REFERRALS TO DEPARTMENT OF JUSTICE OR GAO

Sec.
105.1 Prompt referral.
105.2 Claims collection litigation report.
105.3 Preservation of evidence.
105.4 Minimum amount of referrals to Department of Justice.
105.5 Preliminary referrals to GAO.

AUTHORITY: 31 U.S.C. 3711.

SOURCE: 49 FR 8904, Mar. 9, 1984, unless otherwise noted.

§ 105.1 Prompt referral.

(a) Except as provided in paragraphs (b) and (c) of this section, claims on which aggressive collection action has been taken in accordance with Part 102 of this chapter and which cannot be compromised, or on which collection action cannot be suspended or terminated, in accordance with Parts 103 and 104 of this chapter, shall be promptly referred to the Department of Justice for litigation. Claims for which the gross original amount is over $100,000 shall be referred to the Commercial Litigation Branch, Civil Division, Department of Justice, Washington, D.C. 20530. Claims for which the gross original amount is $100,000 or less shall be referred to the U.S. Attorney in whose judicial district the debtor can be found. Referrals should be made as early as possible, consistent with aggressive agency collection action and the observance of the regulations contained in this chapter, and in any event, well within the period for bringing a timely suit against the debtor. Ordinarily, referrals should be made within one year of the agency's final determination of the fact and the amount of the debt.

(b) Claims arising from audit exceptions taken by the General Accounting Office to payments made by agencies must be referred to the General Accounting Office for review and approval prior to referral to the Department of Justice for litigation, unless the agency concerned has been granted an exception by the General Accounting Office.

(c) When the merits of the Government's claim, the amount owed on the claim, or the propriety of acceptance of a proposed compromise, suspension, or termination are in doubt, the agency concerned should refer the matter to the General Accounting Office for resolution and instructions prior to proceeding with collection action and/or referral to the Department of Justice for litigation.

(d) Once a claim has been referred to GAO or to the Department of Justice pursuant to this section, the referring agency shall refrain from having any contact with the debtor and shall direct the debtor to GAO or the Department of Justice, as appropriate, when questions concerning the claim are raised by the debtor. GAO or the Department of Justice, as appropriate, shall be immediately notified by the referring agency of any payments which are received from the debtor subsequent to referral of a claim under this section.

§ 105.2 Claims collection litigation report.

(a) Unless an exception has been granted by the Department of Justice in consultation with the General Accounting Office, the Claims Collection Litigation Report (CCLR), which was officially implemented by the General Accounting Office on January 20, 1983, shall be used with all referrals of administratively uncollectible claims made pursuant to § 105.1. As required by the CCLR, the following information shall be included.

(1) *Report of prior collection actions.* A checklist or brief summary of the actions previously taken to collect or compromise the claim will be forwarded with the claim upon its referral. If any of the administrative collection actions enumerated in Part 102 of this chapter have been omitted, the reason for their omission must be provided. GAO, the U.S. Attorney, or the Civil Division of the Department of Justice may return claims at their option when there is insufficient justification for the omission of one or more of the administrative collection actions enumerated in Part 102 of this chapter.

(2) *Current address of debtor.* The current address of the debtor, or the name and address of the agent for a corporation upon whom service may

be made shall be provided. Reasonable and appropriate steps will be taken to locate missing parties in all cases. Referrals to the Department of Justice for the institution of foreclosure or other proceedings, in which the current address of any party is unknown, will be accompanied by a listing of the prior known addresses of such party and a statement of the steps taken to locate that party.

(3) *Credit data.* Reasonably current credit data indicating that there is a reasonable prospect of effecting enforced collection from the debtor, having due regard for the exemptions available to the debtor under State and Federal law and the judicial remedies available to the Government, shall be included.

(i) Such credit data may take the form of:

(A) A commercial credit report;

(B) An agency investigative report showing the debtor's assets, liabilities, income, and expenses;

(C) The individual debtor's own financial statement executed under penalty of perjury reflecting the debtor's assets, liabilities, income, and expenses; or

(D) An audited balance sheet of a corporate debtor.

(ii) Such credit data may be omitted if:

(A) A surety bond is available in an amount sufficient to satisfy the claim in full;

(B) The forced sale value of the security available for application to the Government's claim is sufficient to satisfy the claim in full;

(C) The referring agency wishes to liquidate loan collateral through judicial foreclosure but does not desire a deficiency judgment;

(D) The debtor is in bankruptcy or receivership;

(E) The debtor's liability to the Government is fully covered by insurance, in which case the agency will furnish such information as it can develop concerning the identity and address of the insurer and the type and amount of insurance coverage; or

(F) The nature of the debtor is such that credit data is not normally available or cannot reasonably be obtained, for example, a unit of State or local government.

(b) Agencies shall also use the CCLR when referring claims to the Department of Justice in order to obtain the approval of that Department with respect to compromise, suspension, or termination, as required by §§ 103.1(b) and 104.1(b).

§ 105.3 Preservation of evidence.

Care will be taken to preserve all files, records, and exhibits on claims referred or to be referred to the Department of Justice for litigation. Under no circumstances should original documents be sent to the Department of Justice or to the U.S. Attorney without specific prior approval to do so. Copies of relevant documents should be sent whenever necessary.

§ 105.4 Minimum amount of referrals to Department of Justice.

Agencies will not refer claims of less than $600, exclusive of interest, penalties, and administrative costs, for litigation unless: (a) Referral is important to a significant enforcement policy, or (b) the debtor not only has the clear ability to pay the claim but the Government can effectively enforce payment, having due regard for the exemptions available to the debtor under State and Federal law and the judicial remedies available to the Government.

§ 105.5 Preliminary referrals to GAO.

Preliminary referrals of claims to the General Accounting Office, as required by § 105.1(b) and (c), will be in accordance with instructions, including monetary limitations, contained in the General Accounting Office Policy and Procedures Manual for Guidance of Federal Agencies, and the provisions of §§ 105.2 and 105.3 of this part.

Office of Personnel Management

Pay Administration Standards

5 CFR §550-1101.-1108, 49 Fed. Reg. 27470 (July 3, 1984),
51 Fed. Reg. 16670 (May 16, 1986),
51 Fed. Reg. 21325 (June 12, 1986)

Subpart K—Collection by Offset From Indebted Government Employees

Authority: 5 U.S.C. 5514; sec. 8(1) of E.O. 11609; redesignated in sec. 2-1 of E.O. 12107.

Source: 49 FR 27472, July 3, 1984, unless otherwise noted.

§ 550.1101 Purpose.

This subpart provides the standards to be used by Federal agencies to prepare regulations implementing 5 U.S.C. 5514 and by OPM to review and approve such agency regulations, and establishes procedural guidelines to recover debts from the current pay account of an employee when the employee's creditor and paying agencies are not the same.

§ 550.1102 Scope.

(a) *Coverage.* This subpart applies to agencies and employees defined by § 550.1103.

(b) *Applicability.* This subpart and 5 U.S.C. 5514 apply in recovering certain debts by administrative offset, except where the employee consents to the recovery, from the current pay account of an employee. Because it is an administrative offset, debt collection procedures for salary offset which are not specified in 5 U.S.C. 5514 and these regulations should be consistent with the provisions of FCCS.

(1) *Excluded debts or claims.* The procedures contained in this subpart do not apply to debts or claims arising under the Internal Revenue Code of 1954 as amended (26 U.S.C. 1 *et seq.*), the Social Security Act (42 U.S.C. 301 *et seq.*), or the tariff laws of the United States; or to any case where collection of a debt by salary offset is explicity provided for or prohibited by another statute (e.g., travel advances in 5 U.S.C. 5705 and employee training expenses in 5 U.S.C. 4108).

(2) *Waiver requests and claims to the General Accounting Office.* This subpart does not preclude an employee from requesting waiver of a salary overpayment under 5 U.S.C. 5584, 10 U.S.C. 2774, or 32 U.S.C. 716, or in any way questioning the amount or validity of a debt by submitting a subsequent claim to the General Accounting Office in accordance with procedures prescribed by the General Accounting Office. Similarly, in the case of other types of debts, it does not preclude an employee from requesting waiver, if waiver is available under any statutory provision pertaining to the particular debt being collected.

§ 550.1103 Definitions.

For purposes of this subpart—

Agency means (a) an Executive agency as defined in Section 105 of title 5, United States Code, including the U.S. Postal Service and the U.S. Postal Rate Commission; (b) a military department as defined in Section 102 of title 5, United States Code; (c) an agency or court in the judicial branch, including a court as defined in Section 610 of title 28, United States Code, the District Court for the Northern Mariana Islands, and the Judicial Panel on Multidistrict Litigation; (d) an agency of the legislative branch, including the U.S. Senate and the U.S. House of Representatives; and (e) other independent establishments that are entities of the Federal Government.

Creditor agency means the agency to which the debt is owed.

Debt means an amount owed to the United States from sources which include loans insured or guaranteed by the United States and all other amounts due the United States from fees, leases, rents, royalties, services, sales of real or personal property, overpayments, penalties, damages, interest, fines and forfeitures (except those arising under the Uniform Code of Military Justice), and all other similar sources.

Disposable pay means that part of current basic pay, special pay, incentive pay, retired pay, retainer pay, or in the case of an employee not entitled to basic pay, other authorized pay remaining after the deduction of any amount required by law to be withheld. Agencies must exclude deductions described in 5 CFR 581.105 (b) through (f) to determine disposable pay subject to salary offset.

Employee means a current employee of an agency, including a current member of the Armed Forces or a Reserve of the Armed Forces (Reserves).

FCCS means the Federal Claims Collection Standards jointly published by the Justice Department and the General Accounting Office at 4 CFR 101.1 *et seq.*

Paying agency means the agency employing the individual and authorizing the payment of his or her current pay.

Salary offset means an administrative offset to collect a debt under 5 U.S.C. 5514 by deduction(s) at one or more officially established pay intervals from the current pay account of an employee without his or her consent.

Waiver means the cancellation, remission, forgiveness, or non-recovery of a debt allegedly owed by an employee to an agency as permitted or required by 5 U.S.C. 5584, 10 U.S.C. 2774, or 32 U.S.C. 716, 5 U.S.C. 8346(b), or any other law.

[49 FR 27472, July 3, 1984, as amended at 51 FR 16670, May 6, 1986]

§ 550.1104 Agency regulations.

Under this subpart and 5 U.S.C. 5514, each creditor agency must issue regulations, subject to approval by the Office of Personnel Management (OPM), governing the collection of a debt by salary offset. Each agency is responsible for assuring that the regulations governing collection of internal debts are uniformly and consistently applied to all its employees. Agency regulations issued under authority of 5 U.S.C. 5514 must contain the following minimum provisions:

(a) *Applicability or scope.* Indicate whether regulations cover internal or Government-wide collections under 5 U.S.C. 5514, or both.

(b) *Entitlement to notice, hearing, written responses and decisions.* Identify when the employee is entitled to notice, when hearings will be offered, when the employee is entitled to a response or decision after exercising his or her rights under § 5514 and this subpart, and if the hearing official's decision is not in the employee's favor or the employee chooses not to request a hearing, what other rights and remedies are available under the statutes or regulations governing the program that requires the collection to be made. Except as provided in paragraph (c) of this section, each employee from whom the creditor agency proposes to collect a debt under this subpart is entitled to receive from the creditor agency—

(1) A written notice as described in paragraph (d) of this section;

(2) The opportunity to petition for a hearing and, if a hearing is given, to receive a written decision from the official holding the hearing on the following issues:

(i) The determination of the creditor agency concerning the existence or amount of the debt; and

(ii) The repayment schedule, if it was not established by written agreement between the employee and the creditor agency.

(c) *Exception to entitlement to notice, hearing, written responses, and final decisions.* In regulations covering internal collections, an agency shall except from the provisions of paragraph (b) of this section any adjustment to pay arising out of an employee's election of coverage or a change in coverage under a Federal benefits program requiring periodic deductions from pay, if the amount to be recovered was accumulated over four pay periods or less.

(d) *Notification before deductions begin.* Provide for notification before deductions begin. Except as provided in paragraph (c) of this section, deductions under the authority of 5 U.S.C. 5514 must not be made unless the head of the creditor agency or his designee provides the employee at least

30 days before any deduction, written notice stating at a minimum:

(1) The creditor agency's determination that a debt is owed, including the origin, nature, and amount of that debt;

(2) The creditor agency's intention to collect the debt by means of deduction from the employee's current disposable pay accont;

(3) The amount, frequency, proposed beginning date, and duration of the intended deductions;

(4) An explanation of the creditor agency's policy concerning interest, penalties, and administrative costs, including a statement that such assessments must be made unless excused in accordance with the FCCS;

(5) The employee's right to inspect and copy Government records relating to the debt or, if employee or his or her representative cannot personally inspect the records, to request and receive a copy of such records;

(6) If not previously provided, the opportunity (under terms agreeable to the creditor agency) to establish a schedule for the voluntary repayment of the debt or to enter into a written agreement to establish a schedule for repayment of the debt in lieu of offset. The agreement must be in writing, signed by both the employee and the creditor agency; and documented in the creditor agency's files (4 CFR 102.2(e));

(7) The employee's right to a hearing conducted by an official arranged by the creditor agency (an administrative law judge, or alternatively, a hearing official not under the control of the head of the agency) if a petition is filed as prescribed by the creditor agency;

(8) The method and time period for petitioning for a hearing;

(9) That the timely filing of a petition for hearing will stay the commencement of collection proceedings;

(10) That a final decision on the hearing (if one is requested) will be issued at the earliest practical date, but not later than 60 days after the filing of the petition requesting the hearing unless the employee requests and the hearing official grants a delay in the proceedings;

(11) That any knowingly false or frivolous statements, representations, or evidence may subject the employee to:

(i) Disciplinary procedures appropriate under chapter 75 of title 5, United States Code, Part 752 of title 5, Code of Federal Regulations, or any other applicable statutes or regulations;

(ii) Penalties under the False Claims Act, §§ 3729-3731 of title 31, United States Code, or any other applicable statutory authority; or

(iii) Criminal penalties under §§ 286, 287, 1001, and 1002 of title 18, United States Code or any other applicable statutory authority.

(12) Any other rights and remedies available to the employee under statutes or regulations governing the program for which the collection is being made; and

(13) Unless there are applicable contractual or statutory provisions to the contrary, that amounts paid on or deducted for the debt which are later waived or found not owed to the United States will be promptly refunded to the employee.

(e) *Petitions for hearing.* (1) Prescribe the method and time period for petitioning for a hearing. Ordinarily, a hearing may be requested by filing a written petition addressed to the appropriate creditor agency official stating why the employee believes the determination of the agency concerning the existence or amount of the debt is in error.

(2) The employee's petition or statement must be signed by the employee and fully identify and explain with reasonable specificity all the facts, evidence and witnesses, if any, which the employee believes support his or her position.

(f) *Petitions for hearing made after time expires.* Prescribe the action to be taken on a petition for hearing made after the expiration of the period provided in the notice described in paragraph (d) of this section. Ordinarily a creditor agency should accept requests if the employee can show that the delay was because of circumstances beyond his or her control or because of failure to receive notice of the time limit (unless otherwise aware of it).

(g) *Form of hearings, written responses, and final decisions.* (1) Define the form and content of hearings, written responses, and written decisions to be provided when the employee exercises his or her rights under § 5514 and this subpart.

(2) The form and content of hearings granted under this subpart will depend on the nature of the transactions giving rise to the debts included within each debt collection program. Agencies should refer to 4 CFR 102.3(c) for information on hearing form and content.

(3) Written decisions provided after a request for hearing must, at a minimum, state the facts purported to evidence the nature and origin of the alleged debt; the hearing official's analysis, findings and conclusions, in light of the hearing, as to the employee's and/or creditor agency's grounds, the amount and validity of the alleged debt and, where applicable, the repayment schedule.

(h) *Method and source of deductions.* Identify the method and source of deductions. At a minimum, agency regulations must identify the method of collection as salary offset and the source of deductions as current disposable pay, except as provided in paragraphs (l) and (m) of this section.

(i) *Limitation on amount of deductions.* Prescribe the limitations on the amount of the deduction. Ordinarily, the size of installment deductions must bear a reasonable relationship to the size of the debt and the employee's ability to pay (see the FCCS). However, the amount deducted for any period must not exceed 15 percent of the disposable pay from which the deduction is made, unless the employee has agreed in writing to the deduction of a greater amount.

(j) *Duration of deductions.* Prescribe the duration of deductions. Ordinarily, debts must be collected in one lump-sum where possible. However, if the employee is financially unable to pay in one lump-sum or the amount of the debt exceeds 15 percent of disposable pay for an officially established pay interval, collection must be made in installments. Such installment deductions must be made over a period not greater than the anticipated period of active duty or employment, as the case may be, except as provided in paragraphs (l) and (m) of this section.

(k) *When deductions may begin.* Prescribe when deductions will be scheduled to begin in internal agency collections.

(l) *Liquidation from final check.* Provide for offset under 31 U.S.C. 3716, if the employee retires or resigns or if his or her employment or period of active duty ends before collection of the debt is completed, from subsequent payments of any nature (e.g., final salary payment, lump-sum leave, etc.) due the employee from the paying agency as of the date of separation to the extent necessary to liquidate the debt.

(m) *Recovery from other payments due a separated employee* Provide for offset under 31 U.S.C. 3716 from later payments of any kind due the former employee from the United States, where appropriate, if the debt cannot be liquidated by offset from any final payment due the former employee as of the date of separation. (See 4 CFR 102.3.)

(n) *Interest, penalties, and administrative costs.* Provide for the assessment of interest, penalties, and administrative costs on debts being collected under this subpart. These charges and the waiving of them must be prescribed in accordance with 4 CFR 102.13.

(o) *Non-waiver of rights by payments.* Provide that an employee's involuntary payment, of all or any portion of a debt being collected under 5 U.S.C. 5514 must not be construed as a waiver of any rights which the employee may have under 5 U.S.C. 5514 or any other provision of contract or law, unless there are statutory or contractual provisions to the contrary.

(p) *Refunds.* (1) Provide for promptly refunding to the appropriate party, amounts paid or deducted under this subpart when—

(i) A debt is waived or otherwise found not owing to the United States (unless expressly prohibited by statute or regulation); or

(ii) The employee's paying agency is directed by an administrative or judicial order to refund amounts deducted from his or her current pay.

(2) Refunds do not bear interest unless required or permitted by law or contract.

§ 550.1105 Review and approval of agency regulations.

(a) *Initial OPM review of agency regulations.* (1) Creditor agencies must submit regulations to the Office of Personnel Management (OPM) for review in accordance with 5 U.S.C. 5514 and this subpart prior to publication of final regulations or prior to implementation, if intragency collection procedures are not published. Submissions must be for agency-wide and/or Government-wide collections.

(2) Creditor agency regulations must contain all provisions specified in § 550.1104. If agency regulations are incomplete, OPM will return them with information as to what must be done to obtain approval.

(b) *Proposed changes in salary offset regulations.* If a creditor agency proposes significant changes in the regulations covering provisions specified in § 550.1104, the proposed revisions must be submitted to OPM for review and approval prior to implementation.

(c) *Supplemental regulations.* When a creditor agency has issued approved regulations covering the provisions specified in § 550.1104, the agency may issue any supplemental regulations or instructions, consistent with its approved regulations, which are necessary for solely internal operations, without prior OPM approval.

§ 550.1106 Time limit on collection of debts.

Under 4, CFR 102.3(b)(3), agencies may not initiate offset to collect a debt more than 10 years after the Government's right to collect the debt first accrued, with certain exceptions explained in that paragraph.

[51 FR 21325, June 12, 1986]

§ 550.1107 Obtaining the services of a hearing official.

(a) When the debtor does not work for the creditor agency and the creditor agency cannot provide a prompt and appropriate hearing before an administrative law judge or before a hearing official furnished pursuant to another lawful arrangement, the creditor agency may contact an agent of the paying agency designated in Appendix A of Part 581 of this chapter to arrange for a hearing official, and the paying agency must then cooperate as provided by 4 CFR 102.1 and provide a hearing official.

(b) When the debtor works for the creditor agency, the creditor agency may contact any agent (of another agency) designated in Appendix A of Part 581 of this chapter to arrange for a hearing official. Agencies must then cooperate as required by 4 CFR 102.1 and provide a hearing official.

[51 FR 16670, May 6, 1986]

§ 550.1108 Requesting recovery when the current paying agency is not the creditor agency.

(a) *Responsibilities of creditor agency.* Upon completion of the procedures established by the creditor agency under 5 U.S.C. 5514, the creditor agency must do the following:

(1) The creditor agency must certify, in writing, that the employee owes the debt, the amount and basis of the debt, the date on which payment(s) is due, the date the Government's right to collect the debt first accrued, and that the creditor agency's regulations implementing 5 U.S.C. 5514 have been approved by OPM.

(2) If the collection must be made in installments, the creditor agency also must advise the paying agency of the amount or percentage of disposable pay to be collected in each installment, and if the creditor agency wishes, the number and the commencing date of the installments (if a date other than the next officially established pay period is required).

(3) Unless the employee has consented to the salary offset in writing or signed a statement acknowledging receipt of the required procedures and the written consent or statement is forwarded to the paying agency, the creditor agency also must advise the paying agency of the action(s) taken under 5 U.S.C. 5514(b) and give the date(s) the action(s) was taken.

(4) Except as otherwise provided in this paragraph, the creditor agency must submit a debt claim containing

the information specified in paragraphs (a) (1) through (3) of this section and an installment agreement (or other instruction on the payment schedule), if applicable, to the employee's paying agency.

(5) If the employee is in the process of separating, the creditor agency must submit its debt claim to the employee's paying agency for collection as provided in § 550.1104(1). The paying agency must certify the total amount of its collection and notify the creditor agency and the employee as provided in paragraph (c)(1) of this section. If the paying agency is aware that the employee is entitled to payments from the Civil Service Retirement and Disability Fund, or other similar payments, it must provide written notification to the agency responsible for making such payments that the debtor owes a debt (including the amount) and that the provisions of this section have been fully complied with. However, the creditor agency must submit a properly certified claim to the agency responsible for making such payments before the collection can be made.

(6) If the employee is already separated and all payments due from his or her former paying agency have been paid, the creditor agency may request, unless otherwise prohibited, that money due and payable to the employee from the Civil Service Retirement and Disability Fund (5 CFR 831.1801 *et seq.*), or other similar funds, be administratively offset to collect the debt. (See 31 U.S.C. 3716 and the FCCS.)

(b) *Responsibilities of paying agency*—(1) *Complete claim.* When the paying agency receives a properly certified debt claim from a creditor agency, deductions should be scheduled to begin prospectively at the next officially established pay interval. The employee must receive written notice that the paying agency has received a certified debt claim from the creditor agency (including the amount) and written notice of the date deductions from salary will commence and of the amount of such deductions.

(2) *Incomplete claim.* When the paying agency receives an incomplete debt from a creditor agency, the paying agency must return the debt claim with a notice that procedures under 5 U.S.C. 5514 and this subpart must be provided and a properly certified debt claim received before action will be taken to collect from the employee's current pay account.

(3) *Review.* The paying agency is not required or authorized to review the merits of the creditor agency's determination with respect to the amount or validity of the debt certified by the creditor agency.

(c) *Employees who transfer from one paying agency to another.* (1) If, after the creditor agency has submitted the debt claim to the employee's paying agency, the employee transfers to a position served by a different paying agency before the debt is collected in full, the paying agency from which the employee separates must certify the total amount of the collection made on the debt. One copy of the certification must be furnished to the employee, another to the creditor agency along with notice of the employee's transfer. However, the creditor agency must submit a properly certified claim to the new paying agency before collection can be resumed.

(2) When an employee transfers to another paying agency, the creditor agency need not repeat the due process procedures described by 5 U.S.C. 5514 and this subpart to resume the collection. However, the creditor agency is responsible for reviewing the debt upon receiving the former paying agency's notice of the employee's transfer to make sure the collection is resumed by the new paying agency.

[51 FR 21325, June 12, 1986]

Contract Disputes Act

Citations:

41 U.S.C. §§601-613; 5 U.S.C. §5108(c)(3); 28 U.S.C. §§1346(a)(2), 1491(a)(2), 2401(a), 2414, 2510, 2517; 31 U.S.C. §1304(a)(3)(C)(1990); enacted November 1, 1978 by Pub. L. No. 95-563, 92 Stat. 2383; significantly amended April 2, 1982 by Pub. L. No. 97-164, title I, §§156-157, 160, 161, 96 Stat. 25, 47-49, November 5, 1990 by Pub. L. No. 101-509, Sec. 104, 104 Stat. 1447, and November 15, 1990 by Pub. L. No. 101-552, 104 Stat. 2736.

Lead Agency:

Office of Federal Procurement Policy, Office of Management and Budget, Washington, DC 20503 (202) 395-7207.

Overview:

Background. The Contract Disputes Act of 1978 was intended to bring greater consistency, fairness, and efficiency to the resolution of disputes arising out of government contracts. Before the Act's passage, this process was governed by various contract clauses, agency regulations, judicial decisions, and statutory provisions; procedures varied depending on the nature of the dispute and the agency involved. The legislation reflected in large part the recommendations of the Commission on Government Procurement, created by Congress in 1969 to recommend improvements in the procurement process.

Coverage. The Act and its procedures apply to claims arising under or relating to express or implied contracts made by executive branch agencies for the procurement of property other than real property, services, construction, alteration, repair, or maintenance of real property, or for the disposal of personal property. The Act does not reach bid protests or proceedings for the debarment or suspension of government contractors.

The term "claim" is not defined by the Act; however, the Federal Acquisition Regulation (FAR), a detailed regulation establishing uniform procedures and policies for procurement by federal executive agencies, defines it as: "a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract. . . . A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim." 48 CFR §33.201 (1990). Cognizable claims include disputes arising under specific contract clauses (for example, when the parties cannot agree on an amount of compensation owed under clauses authorizing equitable adjustment for contract changes or for site conditions different from those anticipated when the contract was formed) as well as claims for breach of contract. Terminations for default are considered claims by the government under the Act.

Agency Procedures. The system established by the Contract Disputes Act begins with the contracting officer, an agency official authorized to enter into, administer, and terminate contracts on behalf of the government. The contracting officer plays a dual role in the disputes process, both representing the government as a party to the contract and rendering decisions on claims arising out of disputes between the parties. If a dispute arises during contract performance that cannot be amicably resolved (e.g., through exchange of correspondence or negotiation), the contractor can invoke the procedures of the Contract Disputes Act by presenting a claim to the contracting officer. The claim must be in writing, provide adequate notice to the government of the basis for the demand and the relief sought, and clearly indicate the contractor's intent to seek a decision from the contracting officer.

If the essence of the dispute is money (for example, a claim for increased costs or for payment of the contract balance), the contractor must quantify the claim. In addition, for any claim over $50,000, the contractor must certify that "the claim is made in good faith, that the supporting data are accurate and complete to the best of [the contractor's] knowledge and belief, and that the amount requests accurately reflects the contract adjustment for which the contractor believes the government is liable." 41 U.S.C. §605(c)(1). The certification provision, incorporated into the Act to discourage inflated contractor claims, has proven to be one of the more controversial aspects of the law.[1] If a claim for more than $50,000 has not been properly certified, a contracting officer cannot issue an appealable decision on the claim (and thus neither an agency board of contract appeals nor the Claims Court can adjudicate the merits of the case). Of particular concern to the contractor is that interest on a successful claim is payable only from the date the claim was properly certified.

If a claim cannot be settled by mutual agreement, the contracting officer must issue a written decision on the claim, stating the reasons for the decision and informing the contractor of available appeal rights. The Act requires the contracting officer to issue this decision within 60 days of receipt of a claim for $50,000 or less, and within a reasonable time after receipt of a larger claim (in which case the contracting officer must notify the contractor within 60 days as to when the decision will issue). If these deadlines are not met, the contractor may petition an agency board of contract appeals to direct the contracting officer to issue a decision. In any event, if the contracting officer fails to issue a timely decision, the claim will be deemed denied under the statute, permitting the contractor to pursue an appeal.

If the contracting officer issues an adverse decision on a contractor's claim or issues a decision asserting a government claim against the contractor (e.g., terminating the contract for default, asserting a right to excess reprocurement costs, or demanding payment to recover the costs of repairing or replacing defective work), the contractor has two avenues of appeal to choose from. The contractor may file an appeal at the agency board of contract appeals identified in the contract's "Disputes" clause within 90 days after receiving the contracting officer's decision. Alternatively, the contractor may file suit directly in the U.S. Claims Court within 12 months from the date it received the contracting officer's decision. In either forum, proceedings on the claim will be *de novo*; any findings of fact made by the contracting officer in his or her final decision will not be binding. Only the contractor has the right to initiate litigation and to select the forum;

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[1] See Conference Recommendation 83-1, *The Certification Requirement in the Contract Disputes Act*, 1 CFR §305.83-1 (1992); Madden, *Certification Requirements Under the Contract Disputes Act*, Report to the Administrative Conference of the U.S., 1983 ACUS 23.

if the contractor neither appeals nor files suit in the Claims Court, the contracting officer's decision becomes final.

The agency boards of contract appeals (of which there are currently 12) are quasi-judicial tribunals within the executive branch, composed of administrative judges with at least 5 years of public contract law experience who are authorized to adjudicate contract disputes on behalf of the heads of their respective agencies. Congress intended the agency boards to be informal, expeditious, and inexpensive. In spirit, if not always in practice, the procedures of the boards reflect this intention. For example, under uniform rules of procedure for boards of contract appeals developed by the Office of Federal Procurement Policy (see below), hearings are to be "as informal as may be reasonable and appropriate under the circumstances." Contractors may appear *pro se*--without the aid of counsel. Agency boards offer accelerated disposition of appeals involving claims of $50,000 or less (providing resolution within 180 days of the contractor's election) and expedited disposition for disputes of $10,000 or less (with a 120-day resolution period). Moreover, several of the agency boards have taken tentative steps to encourage parties to consider alternatives to full-scale litigation (so-called alternative dispute resolution, or "ADR", see Chapter 3). For instance, the Armed Services Board of Contract Appeals, the largest of the agency boards, distributes a "Notice Regarding Alternative Methods of Dispute Resolution" to its litigants, which describes various alternatives to litigation.

In contrast to the agency boards, which deal exclusively with government contracting, the Claims Court's docket includes a broad range of litigation involving the federal government in adding to government procurement. Its proceedings are somewhat more formalized than those of the boards. For instance, use of the Federal Rules of Evidence is mandatory and corporations must be represented by attorneys. Despite its formalities, the court has implemented two methods of ADR: settlement judges and minitrials. Although the Claims Court does not offer accelerated or expedited procedures, it can (unlike the agency boards) adjudicate disputes alleging fraud and grant injunctive relief. In contrast to agency board decisions, which are collegial, Claims Court decisions are issued by a single judge.

The contractor may appeal the decision of either tribunal to the U.S. Court of Appeals for the Federal Circuit. In addition, the Act permits the government (with the Attorney General's approval) to appeal adverse decisions; previously, the government could not appeal contract appeals board decisions. The standard of review for findings of fact by contract appeals boards is one of substantial evidence (this standard was retained from preexisting law); for Claims Court decisions, the Federal Circuit will apply a "clearly erroneous," standard to rulings on questions of fact.

Practically speaking, the decision of the Federal Circuit ends the litigation. A party may not seek review by the Supreme Court as a matter of right, and the Supreme Court rarely agrees to consider government contract cases.

OFPP Guidance. The Act directed the Office of Federal Procurement Policy to issue guidelines for the establishment and procedures of agency contract appeals boards. The model rules developed pursuant to this mandate appear in the Appendix to this chapter. (Individual boards' procedural rules are cited below.) In addition, the Office of Federal Procurement Policy issued a policy directive (OFPP Policy Letter 80-3; see Appendix) setting forth procedures for handling claims by agency contracting officers and the text of a disputes clause to be included in government contracts.

Other Provisions. In addition to establishing a single comprehensive law covering the contract disputes process for almost all government contracts (some, such as procurements by the Tennessee Valley Authority, remain outside the scope of the law), the Contract Disputes Act made several other important changes in existing law. The Act strengthened contract appeals boards, giving them subpoena power and authorizing them to grant any relief within the authority of the Claims Court.[2] Moreover, appeals boards can now hear breach of contract claims as well as those "arising under" a contract. The law also added new requirements for selecting contract appeals board members, intended to enhance the quality and independence of the boards.

Legislative History:

Efforts to pass contract disputes legislation began after the Commission on Government Procurement issued its final report and recommendations in 1973 and reached fruition in October

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[2] Amendments to the Equal Access to Justice Act in 1985 authorized the boards to award attorneys fees and expenses under the Equal Access to Justice Act, eliminating one of the distinctions between the two fora. (See Chapter 7.)

1978. H.R. 11002 was introduced by Representatives Harris (D. Va.) and Kindness (R. Ohio) on February 20, 1978 and reported favorably by the House Judiciary Committee without hearings. (The Commission had held hearings on similar legislation the previous year.) The House passed the bill on September 26, 1978. A similar Senate bill, S. 3178, was introduced by Senators Chiles (D. Fla.), Packwood (R. Ore.), Heinz (R. Pa.), and DeConcini (D. Ariz.) on June 7, 1978 and favorably reported, with amendments, by the Committees on Governmental Affairs and the Judiciary. The Senate took up floor consideration of the bill on October 12, agreeing to amendments that exempted the Tennessee Valley Authority from certain of the Act's requirements, added the requirement that claims of $50,000 or more be certified, deleted a requirement that an informal settlement conference be afforded contractors, and changed the standard of judicial review of contract appeals board decisions from "clearly erroneous" to "substantial evidence," among other things. The Senate then passed H.R. 11002, amended to contain the amended provisions of S. 3178, and the House agreed to the Senate-passed version the next day.

Perhaps because it was passed quickly, at the end of the legislative session, the Contract Disputes Act (including the Senate amendments to it) was not the subject of extensive debate. However, the Congressional Record for October 12 does include a brief explanation of the amendments agreed to on the floor (95 Cong. Rec. 36261-68).

Source Note:

There are considerable materials available on federal contract law generally and on contract disputes and the 1978 Act specifically. Most of these materials are aimed at practicing attorneys specializing in government contract law. The items listed here are representative of the types of materials available; the list is by no means complete. Of these materials the looseleaf services published by Commerce Clearinghouse (*Government Contract Reporter* and *Contract Appeals Board Decisions*) are the most comprehensive and, because they are frequently updated, the most current. *The Government Contractor* also provides up-to-date information and analysis. *Government Contract Disputes* (1986) and *Government Contract Claims* (1981) include extensive historical material and information on other aspects of government contract law as well as the Contract Disputes Act. Other publications, such as *Contract Disputes Act of 1978: Explanation and Analysis* (1979), provide overviews of the effect of the Act on preexisting contract law. Crowell and Pou's *Appealing Government Contract Decisions* (1990) examines and gives advice on using ADR in contract claims. For more on this issue, see Chapter 3. Note that pre-1982 publications do not reflect amendments to the Act made by the Federal Courts Improvement Act of 1982, which (among other things) created the Court of Appeals for the Federal Circuit and gave it jurisdiction over appeals from decisions of contract appeals boards and decisions of the Claims Court.

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National Aeronautics and Space Administration	14 CFR Part 1209, Subpart 1 and Part 1241
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Tennessee Valley Authority	18 CFR Part 1308
Transportation	48 CFR Parts 6301, 6302
Veterans Affairs	38 CFR §§1.770-1.783

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Contract Disputes Act

Title 41, U.S. Code

Chapter 9--Contract Disputes

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§613. Separability.

§601. Definitions

As used in this chapter-

(1) the term "agency head" means the head and any assistant head of an executive agency, and may "upon the designation by" the head of an executive agency include the chief official of any principal division of the agency;

(2) the term "executive agency" means an executive department as defined in section 101 of title 5, an independent establishment as defined by section 104 of title 5 (except that it shall not include the General Accounting Office), a military department as defined by section 102 of title 5, and a wholly owned Government corporation as defined by section 9101(3) of title 31, the United States Postal Service, and the Postal Rate Commission;

(3) The term "contracting officer" means any person who, by appointment in accordance with applicable regulations, has the authority to enter into and administer contracts and make determinations and findings with respect thereto. The term also includes the authorized representative of the contracting officer, acting within the limits of his authority;

(4) the term "contractor" means a party to a Government contract other than the Government;

(5) The term "Administrator" means the Administrator for Federal Procurement Policy appointed pursuant to the Office of Federal Procurement Policy Act [41 U.S.C. 401 et seq.];

(6) The term "agency board" means an agency board of contract appeals established under section 607 of this title; and

(7) The term "misrepresentation of fact" means a false statement of substantive fact, or any conduct which leads to a belief of a substantive fact material to proper understanding of the matter in hand, made with intent to deceive or mislead.

(Pub. L. No. 95-563, §2, Nov. 1, 1978, 92 Stat. 2383.)

§602. Applicability of law

(a) Executive agency contracts

Unless otherwise specifically provided herein, this chapter applies to any express or implied contract (including those of the nonappropriated fund activities described in sections 1346 and 1491 of title 28) entered into by an executive agency for--

(1) the procurement of property, other than real property in being;

(2) the procurement of services;

(3) the procurement of construction, alteration, repair or maintenance of real property; or,

(4) the disposal of personal property.

(b) Tennessee Valley Authority contracts

With respect to contracts of the Tennessee Valley Authority, the provisions of this chapter shall apply only to those contracts which contain a disputes clause requiring that a contract dispute be resolved through an agency administrative process. Notwithstanding any other provision of this chapter, contracts of the Tennessee Valley Authority for the sale of fertilizer or electric power or related to the conduct or operation of the electric power system shall be excluded from the chapter.

(c) Foreign government or international organization contracts

This chapter does not apply to a contract with a foreign government, or agency thereof, or international organization, or subsidiary body thereof, if the head of the agency determines that the application of the chapter to the contract would not be in the public interest.
(Pub. L. No. 95-563, §3, Nov. 1, 1978, 92 Stat. 2383.)

§603. Maritime contracts

Appeals under paragraph (g) of section 607 of this title and suits under section 609 of this title, arising out of maritime contracts, shall be governed by chapter 20 or 22 of title 46, Appendix, as applicable, to the extent that those chapters are not inconsistent with this chapter.
(Pub. L. No. 95-563, §4, Nov. 1, 1978, 92 Stat. 2384.)

§604. Fraudulent claims

If a contractor is unable to support any part of his claim and it is determined that such inability is attributable to misrepresentation of fact or fraud on the part of the contractor, he shall be liable to the Government for an amount equal to such unsupported part of the claim in addition to all costs to the Government attributable to the cost of reviewing said part of his claim. Liability under this subsection[1] shall be determined within six years of the commission of such misrepresentation of fact or fraud.
(Pub. L. No. 95-563, §5, Nov. 1, 1978, 92 Stat. 2384.)

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[1] So in original. Probably should be "section".

§ 605. Decision by contracting officer

(a) Contractor claims

All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision. All claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer. The contracting officer shall issue his decisions in writing, and shall mail or otherwise furnish a copy of the decision to the contractor. The decision shall state the reasons for the decision reached, and shall inform the contractor of his rights as provided in this chapter. Specific findings of fact are not required, but, if made, shall not be binding in any subsequent proceeding. The authority of this subsection shall not extend to a claim or dispute for penalties or forfeitures prescribed by statute or regulation which another Federal agency is specifically authorized to administer, settle, or determine. This section shall not authorize any agency head to settle, compromise, pay, or otherwise adjust any claim involving fraud.

(b) Review; performance of contract pending appeal

The contracting officer's decision on the claim shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency, unless an appeal or suit is timely commenced as authorized by this chapter. Nothing in this chapter shall prohibit executive agencies from including a clause in government contracts requiring that pending final decision of an appeal, action, or final settlement, a contractor shall proceed diligently with performance of the contract in accordance with the contracting officer's decision.

(c) Amount of claim; certification; notification; time of issuance; presumption

(1) A contracting officer shall issue a decision on any submitted claim of $50,000 or less within sixty days from his receipt of a written request from the contractor that a decision be rendered within that period. For claims of more than $50,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable.

(2) A contracting officer shall, within sixty days of receipt of a submitted certified claim over $50,000--

(A) issue a decision; or

(B) notify the contractor of the time within which a decision will be issued.

(3) The decision of a contracting officer on submitted claims shall be issued within a reasonable time, in accordance with regulations promulgated by the agency, taking into account such factors as the size and complexity of the claim and the adequacy of the information in support of the claim provided by the contractor.

(4) A contractor may request the agency board of contract appeals to direct a contracting officer to issue a decision in a specified period of time, as determined by the board, in the event of undue delay on the part of the contracting officer.

(5) Any failure by the contracting officer to issue a decision on a contract claim within the period required will be deemed to be a decision by the contracting officer denying the claim and will authorize the commencement of the appeal or suit on the claim as otherwise provided in this chapter. However, in the event an appeal or suit is so commenced in the absence of a prior decision by the contracting officer, the tribunal concerned may, at its option, stay the proceedings to obtain a decision on the claim by the contracting officer.

(d) Alternative means of dispute resolution

Notwithstanding any other provision of this chapter, a contractor and a contracting officer may use any alternative means of dispute resolution under subchapter IV of chapter 5 of title 5, or other mutually agreeable procedures, for resolving claims. In a case in which such alternative means of dispute resolution or other mutually agreeable procedures are used, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his or her knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable. All provisions of subchapter IV of chapter 5 of title 5, shall apply to such alternative means of dispute resolution.

(e) Termination of authority to engage in alternative means of dispute resolution; savings provision

The authority of agencies to engage in alternative means of dispute resolution proceedings under subsection (d) of this section shall cease to be effective on October 1, 1995, except that such authority shall continue in effect with respect to then pending dispute resolution proceedings which, in the judgment of the agencies that are parties to such proceedings, require such continuation, until such proceedings terminate.
(Pub. L. No. 95-563, §6, Nov. 1, 1978, 92 Stat. 2384; Pub. L. No. 101-552, §6(a), Nov. 15, 1990, 104 Stat. 2745.)

§606. Contractor's right of appeal to board of contract appeals

Within ninety days from the date of receipt of a contracting officer's decision under section 605 of this title, the contractor may appeal such decision to an agency board of contract appeals, as provided in section 607 of this title.
(Pub. L. No. 95-563, §7, Nov. 1, 1978, 92 Stat. 2385.)

§607. Agency boards of contracts appeals

(a) Establishment; consultation; Tennessee Valley Authority

(1) Except as provided in paragraph (2) an agency board of contract appeals may be established within an executive agency when the agency head, after

consultation with the Administrator, determines from a workload study that the volume of contract claims justifies the establishment of a full-time agency board of at least three members who shall have no other inconsistent duties. Workload studies will be updated at least once every three years and submitted to the Administrator.

(2) The Board of Directors of the Tennessee Valley Authority may establish a board of contract appeals for the Authority of an indeterminate number of members.

(b) Appointment of members; chairman; compensation

(1) Except as provided in paragraph (2), the members of agency boards shall be selected and appointed to serve in the same manner as administrative law judges appointed pursuant to section 3105 of title 5, with an additional requirement that such members shall have had not fewer than five years' experience in public contract law. Full-time members of agency boards serving as such on the effective date of this chapter shall be considered qualified. The chairman and vice chairman of each board shall be designated by the agency head from members so appointed. Compensation for the chairman, the vice chairman, and all other members of an agency board shall be determined under section 5372a of title 5.

(2) The Board of Directors of the Tennessee Valley Authority shall establish criteria for the appointment of members to its agency board of contract appeals established in subsection (a)(2) of this section, and shall designate a chairman of such board. The chairman and all other members of such board shall receive compensation, at the daily equivalent of the rates determined under section 5372a of title 5, for each day they are engaged in the actual performance of their duties as members of the board.

(c) Appeals; inter-agency arrangements

If the volume of contract claims is not sufficient to justify an agency board under subsection (a) of this section or if he otherwise considers it appropriate, any agency head shall arrange for appeals from decisions by contracting officers of his agency to be decided by a board of contract appeals of another executive agency. In the event an agency head is unable to make such an arrangement with another agency, he shall submit the case to the Administrator for placement with an agency board. The provisions of this subsection shall not apply to the Tennessee Valley Authority.

(d) Jurisdiction

Each agency board shall have jurisdiction to decide any appeal from a decision of a contracting officer (1) relative to a contract made by its agency, and (2) relative to a contract made by any other agency when such agency or the Administrator has designated the agency board to decide the appeal. In exercising this jurisdiction, the agency board is authorized to grant any relief that would be available to a litigant asserting a contract claim in the United States Claims Court.

(e) Decisions

An agency board shall provide to the fullest extent practicable, informal, expeditious, and inexpensive resolution of disputes, and shall issue a decision in writing or take other appropriate action on each appeal submitted, and shall mail or otherwise furnish a copy of the decision to the contractor and the contracting officer.

(f) Accelerated appeal disposition

The rules of each agency board shall include a procedure for the accelerated disposition of any appeal from a decision of a contracting officer where the amount in dispute is $50,000 or less. The accelerated procedure shall be applicable at the sole election of only the contractor. Appeals under the accelerated procedure shall be resolved, whenever possible, within one hundred and eighty days from the date the contractor elects to utilize such procedure.

(g) Review

(1) The decision of an agency board of contract appeals shall be final, except that--

(A) a contractor may appeal such a decision to the United States Court of Appeals for the Federal Circuit within one hundred twenty days after the date of receipt of a copy of such decision, or

(B) the agency head, if he determines that an appeal should be taken, and with the prior approval of the Attorney General, transmits the decision of the board of contract appeals to the Court of Appeals for the Federal Circuit for judicial review under section 1295 of title 28, within one hundred and twenty days from the date of the agency's receipt of a copy of the board's decision.

(2) Notwithstanding the provisions of paragraph (1), the decision of the board of contract appeals of the Tennessee Valley Authority shall be final, except that--

(A) a contractor may appeal such a decision to a United States district court pursuant to the provisions of section 1337 of title 28, within one hundred twenty days after the date of receipt of a copy of such decision, or

(B) The Tennessee Valley Authority may appeal the decision to a United States district court pursuant to the provisions of section 1337 of title 28, within one hundred twenty days after the date of the decision in any case.

(3) An award by an arbitrator under this chapter shall be reviewed pursuant to sections 9 through 13 of title 9, except that the court may set aside or limit any award that is found to violate limitations imposed by Federal statute.

(h) Procedural guidelines

Pursuant to the authority conferred under the Office of Federal Procurement Policy Act [41 U.S.C. 401 et seq.], the Administrator is authorized and directed, as may be necessary or desirable to carry out the provisions of this chapter, to issue guidelines with respect to criteria for the establishment, functions, and procedures of the agency boards (except for a board established by the Tennessee Valley Authority).

(Pub. L. No. 95-563, §8, Nov. 1, 1978, 92 Stat. 2385; Pub. L. No. 97-164, title I, §§156, 160(a)(15), Apr. 2, 1982, 96 Stat. 47, 48; Pub. L. No. 101-509, title V, §529 [title I, §104(d)(4)], Nov. 5, 1990, 104 Stat. 1427, 1447; Pub. L. No. 101-552, §6(b), Nov. 15, 1990, 104 Stat. 2746.)

§608. Small claims

(a) Accelerated disposition of appeals

The rules of each agency board shall include a procedure for the expedited disposition of any appeal from a decision of a contracting officer where the amount in dispute is $10,000 or less. The small claims procedure shall be applicable at the sole election of the contractor.

(b) Simplified rules of procedure

The small claims procedure shall provide for simplified rules of procedure to facilitate the decision of any appeal thereunder. Such appeals may be decided by a single member of the agency board with such concurrences as may be provided by rule or regulation.

(c) Time of decision

Appeals under the small claims procedure shall be resolved, whenever possible, within one hundred twenty days from the date on which the contractor elects to utilize such procedure.

(d) Finality of decision

A decision against the Government or the contractor reached under the small claims procedure shall be final and conclusive and shall not be set aside except in cases of fraud.

(e) Effect of decision

Administrative determinations and final decisions under this section shall have no value as precedent for future cases under this chapter.

(f) Review of requisite amount in controversy

The Administrator is authorized to review at least every three years, beginning with the third year after November 1, 1978, the dollar amount defined in subsection (a) of this section as a small claim, and based upon economic indexes selected by the Administrator adjust that level accordingly.
(Pub. L. No. 95-563, §9, Nov. 1, 1978, 92 Stat. 2387.)

§609. Judicial review of board decisions

(a) Actions in United States Claims Court; district court actions; time for filing

(1) Except as provided in paragraph (2), and in lieu of appealing the decision of the contracting officer under section 605 of this title to an agency board, a contractor may bring an action directly on the claim in the United States Claims Court, notwithstanding any contract provision, regulation, or rule of law to the contrary.

(2) In the case of an action against the Tennessee Valley Authority, the contractor may only bring an action directly on the claim in a United States district court pursuant to section 1337 of title 28, notwithstanding any contract provision, regulation, or rule of law to the contrary.

(3) Any action under paragraph (1) or (2) shall be filed within twelve months from the date of the receipt by the contractor of the decision of the contracting officer concerning the claim, and shall proceed de novo in accordance with the rules of the appropriate court.

(b) Finality of board decision

In the event of an appeal by a contractor or the Government from a decision of any agency board pursuant to section 607 of this title, notwithstanding any contract provision, regulation, or rules of law to the contrary, the decision of the agency board on any question of law shall not be final or conclusive, but the decision on any question of fact shall be final and conclusive and shall not be set aside unless the decision is fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence.

(c) Remand or retention of case

In any appeal by a contractor or the Government from a decision of an agency board pursuant to section 607 of this title, the court may render an opinion and judgement and remand the case for further action by the agency board or by the executive agency as appropriate, with such direction as the court considers just and proper.

(d) Consolidation

If two or more suits arising from one contract are filed in the United States Claims Court and one or more agency boards, for the convenience of parties or witnesses or in the interest of justice, the United States Claims Court may order the consolidation of such suits in that court or transfer any suits to or among the agency boards involved.

(e) Judgments as to fewer than all claims

In any suit filed pursuant to this chapter involving two or more claims, counterclaims, cross-claims, or third-party claims, and where a portion of one such claim can be divided for purposes of decision or judgment, and in any such suit where multiple parties are involved, the court, whenever such action is appropriate, may enter a judgment as to one or more but fewer than all of the claims, portions thereof, or parties.
(Pub. L. No. 95-563, §10, Nov. 1, 1978, 92 Stat. 2388; Pub. L. No. 97-164, title I, §§157, 160(a)(15), 161(10), Apr. 2, 1982, 96 Stat. 47-49.)

§610. Subpena, discovery, and deposition

A member of an agency board of contract appeals may administer oaths to witnesses, authorize depositions and discovery proceedings, and require by subpena the attendance of witnesses, and production of books and papers, for the taking of testimony or evidence by deposition or in the hearing of an appeal by the agency board. In case of contumacy or refusal to obey a subpena by a person who resides, is found, or transacts business within the jurisdiction of a United States district court, the court, upon application of the agency board through the Attorney General; or upon application by the board of contract appeals of the Tennessee Valley Authority, shall have jurisdiction to issue the person an order requiring him to appear before the agency board or a member thereof, to produce evidence or to give testimony, or both. Any failure of any such person to obey the order of the court may be punished by the court as a contempt thereof.
(Pub. L. No. 95-563, §11, Nov. 1, 1978, 92 Stat. 2388.)

§611. Interest

Interest on amounts found due contractors on claims shall be paid to the contractor from the date the contracting officer receives the claim pursuant to section 605(a) of this title from the contractor until payment thereof. The interest provided for in this section shall be paid at the rate established by the Secretary of the Treasury pursuant to Public Law 92-41 (85 Stat. 97) for the Renegotiation Board.
(Pub. L. No. 95-563, §12, Nov. 1, 1978, 92 Stat. 2389.)

§612. Payment of claims

(a) Judgments

Any judgment against the United States on a claim under this chapter shall be paid promptly in accordance with the procedures provided by section 1304 of title 31.

(b) Monetary awards

Any monetary award to a contractor by an agency board of contract appeals shall be paid promptly in accordance with the procedures contained in subsection (a) of this section.

(c) Reimbursement

Payments made pursuant to subsections (a) and (b) of this section shall be reimbursed to the fund provided by section 1304 of title 31 by the agency whose appropriations were used for the contract out of available funds or by obtaining additional appropriations for such purposes.

(d) Tennessee Valley Authority

(1) Notwithstanding the provisions of subsection (a) through (c) of this section, any judgment against the Tennessee Valley Authority on a claim under this chapter shall be paid promptly in accordance with the provisions of section 831h(b) of title 16.

(2) Notwithstanding the provisions of subsection (a) through (c), any monetary award to a contractor by the board of contract appeals for the Tennessee Valley Authority shall be paid in accordance with the provisions of section 831h(b) of title 16.
(Pub. L. No. 95-563, §13, Nov. 1, 1978, 92 Stat. 2389.)

§613. Separability

If any provision of this chapter, or the application of such provision to any persons or circumstances, is held invalid, the remainder of this chapter, or the application of such provision to persons or circumstances other than those to which it is held invalid, shall not be affected thereby.
(Pub. L. No. 95-563, §15, Nov. 1, 1978, 92 Stat. 2391.)

* * * *

Title 28, U.S. Code

§1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. or the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

* * * *

§1491. Claims against United States generally; actions involving Tennessee Valley Authority

(a)(1) The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Claims Court shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 10(a)(1) of the Contract Disputes Act of 1978.

(3) To afford complete relief on any contract claim brought before the contract is awarded, the court shall have exclusive jurisdiction to grant declaratory judgments and such equitable and extraordinary relief as it deems proper, including but not limited to injunctive relief. In exercising this jurisdiction, the court shall give due regard to the interests of national defense and national security.

(b) Nothing herein shall be construed to give the United States Claims Court jurisdiction of any civil action within the exclusive jurisdiction of the Court of International Trade, or of any action against, or founded on conduct of, the Tennessee Valley Authority, or to amend or modify the provisions of the

Tennessee Valley Authority Act of 1933 with respect to actions by or against the Authority.
(June 25, 1948, ch. 646, 62 Stat. 940; July 28, 1953, ch. 253, §7, 67 Stat. 226; Sept. 3, 1954, ch. 1263, §44(a), (b), 68 Stat. 1241; July 23, 1970, Pub. L. No. 91-350, §1(b), 84 Stat. 449; Aug. 29, 1972, Pub. L. No. 92-415, §1, 86 Stat. 652; Nov. 1, 1978, Pub. L. No. 95-563, §14(i), 92 Stat. 2391; Oct. 10, 1980, Pub. L. No. 96-417, title V, §509, 94 Stat. 1743; Apr. 2, 1982, Pub. L. No. 97-164, title I, §133(a), 96 Stat. 39.)

* * * *

§2401. Time for commencing action against United States

(a) Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.
(June 25, 1948, ch. 646, 62 Stat. 971; Apr. 25, 1949, ch. 92, §1, 63 Stat. 62; Sept. 8, 1959, Pub. L. No. 86-238, §1(3), 73 Stat. 472; July 18, 1966, Pub. L. No. 89-506, §7, 80 Stat. 307; Nov. 1, 1978, Pub. L. No. 95-563, §14(b), 92 Stat. 2389.)

* * * *

§2414. Payment of judgments and compromise settlements

Except as provided by the Contract Disputes Act of 1978, payment of final judgments rendered by a district court or the Court of International Trade against the United States shall be made on settlements by the General Accounting Office. Payment of final judgments rendered by a State or foreign court or tribunal against the United States, or against its agencies or officials upon obligations or liabilities of the United States, shall be made on settlements by the General Accounting Office after certification by the Attorney General that it is in the interest of the United States to pay the same.

Whenever the Attorney General determines that no appeal shall be taken from a judgment or that no further review will be sought from a decision affirming the same, he shall so certify and the judgment shall be deemed final.

Except as otherwise provided by law, compromise settlements of claims referred to the Attorney General for defense of imminent litigation or suits against the United States, or against its agencies or officials upon obligations or liabilities of the United States, made by the Attorney General or any person authorized by him, shall be settled and paid in a manner similar to judgments in like causes and

appropriations or funds available for the payment of such judgments are hereby made available for the payment of such compromise settlements.
(June 25, 1948, ch. 646, 62 Stat. 974; Aug. 30, 1961, Pub. L. No. 87-187, §1, 75 Stat. 415; Nov. 1, 1978, Pub. L. No. 95-563, §14(d), 92 Stat. 2390; Oct. 10, 1980, Pub. L. No. 96-417, title V, §512, 94 Stat. 1744.)

§2510. Referral of cases by Comptroller General

(a) The Comptroller General may transmit to the United States Claims Court for trial and adjudication any claim or matter of which the Claims Court might take jurisdiction on the voluntary action of the claimant, together with all vouchers, papers, documents, and proofs pertaining thereto.

(b) The Claims Court shall proceed with the claims or matters so referred as in other cases pending in such Court and shall render judgment thereon.
(June 25, 1948, ch. 646, 62 Stat. 977; July 28, 1953, ch. 253, §11, 67 Stat. 227; Sept. 3, 1954, ch. 1263, §47(b), 68 Stat. 1243; Nov. 1, 1978, Pub. L. No. 95-563, §14(h)(1), (2)(A), 92 Stat. 2390; Apr. 2, 1982, Pub. L. No. 97-164, title I, §139(i)(1), 96 Stat. 43.)

* * * *

§2517. Payment of judgments

(a) Except as provided by the Contract Disputes Act of 1978, every final judgment rendered by the United States Claims Court against the United States shall be paid out of any general appropriation therefor, on presentation to the General Accounting Office of a certification of the judgment by the clerk and chief judge of the court.

(b) Payment of any such judgment and of interest thereon shall be a full discharge to the United States of all claims and demands arising out of the matters involved in the case or controversy, unless the judgment is designated a partial judgment, in which event only the matters described therein shall be discharged.
(June 25, 1948, ch. 646, 62 Stat. 979; Nov. 1, 1978, Pub. L. No. 95-563, §14(e), (f), 92 Stat. 2390; Apr. 2, 1982, Pub. L. No. 97-164, title I, §139(k), 96 Stat. 43.)

* * * *

Title 31, U.S. Code

§1304. Judgments, awards, and compromise settlements

(a) Necessary amounts are appropriated to pay final judgments, awards, compromise settlements, and interest and costs specified in the judgments or otherwise authorized by law when--

(1) payment is not otherwise provided for;
(2) payment is certified by the Comptroller General; and
(3) the judgment, award, or settlement is payable--

(A) under section 2414, 2517, 2672, or 2677 of title 28;

(B) under section 3723 of this title;

(C) under a decision of a board of contract appeals; or

(D) in excess of an amount payable from the appropriations of an agency for a meritorious claim under section 2733 or 2734 of title 10, section 715 of title 32, or section 203 of the National Aeronautics and Space Act of 1958 (42 U.S.C. 2473).

(b)(1) Interest may be paid from the appropriation made by this section--

(A) on a judgment of a district court, only when the judgment becomes final after review on appeal or petition by the United States Government, and then only from the date of filing of the transcript of the judgment with the Comptroller General through the day before the date of the mandate of affirmance; or

(B) on a judgment of the Court of Appeals for the Federal Circuit or the United States Claims Court under section 2516(b) of title 28, only from the date of filing of the transcript of the judgment with the Comptroller General through the day before the date of the mandate of affirmance.

(2) Interest payable under this subsection in a proceeding reviewed by the Supreme Court is not allowed after the end of the term in which the judgment is affirmed.

(Pub. L. No. 97-258, §§1, 2(m)(2), Sept. 13, 1982, 96 Stat. 917, 1062.)

PROPOSED UNIFORM RULES OF PROCEDURE FOR BOARDS OF CONTRACT APPEALS

Office of Federal Procurement Policy

44 Fed. Reg. 5219 (January 25, 1979)

[3110-01-M]

UNIFORM RULES OF PROCEDURE FOR BOARDS OF CONTRACT APPEALS

Invitation for Public Comment

AGENCY: Office of Federal Procurement Policy (OFPP), Office of Management and Budget.

ACTION: Notice of proposed direction regarding Uniform Rules of Procedure for Boards of Contract Appeals.

SUMMARY: This proposed direction would instruct the General Services Administration and the Department of Defense to incorporate changes regarding rules of Boards of Contract Appeals and related material into the Federal Procurement Regulations (FPR) and Defense Acquisition Regulations (DAR).

On November 1, 1978, the President signed into law Pub. L. 95-563, the "Contract Disputes Act of 1978."

That Act, among other things, requires changes to the Rules of Procedure currently in use by the Boards of Contract Appeals of the procuring agencies, as well as certain other changes in contract clauses and procurement regulations. The proposed regulations set forth below incorporate the changes required by Pub. L. 95-563, as well as certain other improvements. The proposed Rules of Procedure are to be adopted uniformly by all Boards of Contract Appeals.

DATE: Comments must be received on or before February 23, 1979.

ADDRESS: Comments are to be submitted to the Office of Federal Procurement Policy, OMB, 726 Jackson Place, NW., Room 9025, Washington, D.C. 20503.

FOR FURTHER INFORMATION CONTACT:

Mr. Owen Birnbaum, Deputy Associate Administrator for Acquisition Law (202) 395-3455.

LESTER A. FETTIG,
Administrator.

PROPOSED RULES OR PROCEDURES

PREFACE TO RULES

1. *Jurisdiction for considering appeals*

The —— Board of Contract Appeals (referred to herein as "the Board") shall consider and determine appeals from decisions of contracting officers relating to contracts awarded by (i) the —— (executive agency) or (ii) any other executive agency when such agency or the Administrator for Federal Procurement Policy has designated the Board to decide the appeal.

2. *Organization and location of the Board*

(a) The Board's address is (——).

(b) The Board consists of a Chairman, (Vice Chairman), and other members, all of whom are attorneys at law duly licensed by any state, commonwealth, territory, or the District of Columbia. In general, the appeals are assigned to a panel of at least (—) members who decide the case by a majority vote.

3. *Board of Contract Appeals procedure*

(a) Time, computation, and extensions—

(1) Where possible, procedural actions should be taken in less time than the maximum time allowed. Where appropriate and justified, however, extensions of time will be granted. All requests for extensions of time shall be in writing.

(2) In computing any period of time, the day of the event from which the designated period of time begins to run shall not be included, but the last day of the period shall be included unless it is a Saturday, Sunday, or a legal holiday, in which event the period shall run to the end of the next business day.

PRELIMINARY PROCEDURES

1. *Appeals, How Taken*

(a) Notice of an appeal must be in writing and together with two copies must be filed with the contracting officer from whose decision the appeal is taken. The notice of appeal must be mailed or otherwise filed within ninety (90) days from the date of receipt of a contracting officer's final decision.

(b) Where the contractor has submitted a claim of $50,000 or less to the contracting officer and has requested a written final decision within sixty (60) days from receipt of such request, and the contracting officer has not done so, the contractor may file a written notice of appeal directly with the Board, citing the failure of the contracting officer to issue a decision.

(c) Where the contractor has submitted a claim in excess of $50,000 to the contracting officer and the contracting officer has failed to issue a final decision within a reasonable time, the contractor may file a written notice of appeal directly with the Board, citing the failure to issue a decision.

(d) Upon docketing of appeals filed pursuant to (b) or (c) hereof, the Board may, on motion of either party, or on its own motion, stay further proceedings pending issuance of a final decision by the contracting officer within such period of time as is determined by the Board.

2. *Notice of Appeal, Contents of*

A notice of appeal should indicate that an appeal is being taken and should identify the contract (by number), the department and agency or bureau involved in the dispute, and the decision from which the appeal is taken. The notice of appeal should be signed by the appellant (the contractor making the appeal), or by the appellant's duly authorized representative or attorney. The complaint referred to in Rule 6 may be filed with the notice of appeal, or the appellant may designate the notice of appeal as a complaint, if it otherwise fulfills the requirements of a complaint.

3. *Forwarding of appeals*

When a notice of appeal in any form has been received by the contracting officer he shall endorse thereon the date of mailing (or date of receipt, if otherwise conveyed) and within 10 days shall forward it to the Board. Following receipt by the Board of the original notice of an appeal (whether through the contracting officer or otherwise), the appellant and contracting officer will be promptly advised of its receipt and the appellant will be furnished a copy of these rules.

4. *Preparation, Content, Organization, Forwarding, and Status of Appeal File*

(a). Duties of Contracting Officer—Within 30 days of receipt of an appeal, or notice that an appeal has been filed, the contracting officer shall assemble and transmit to the Board (through the   ) an appeal file consisting of all documents pertinent to the appeal, including:

(1) The decision from which the appeal is taken;

(2) The contract including specifications and pertinent amendments, plans and drawings;

(3) All correspondence between the parties pertinent to the appeal, including the letter or letters of claim in response to which the decision was issued;

(4) Transcripts of any testimony taken during the course of proceedings, and affidavits or statements of any witnesses on the matter in dispute made prior to the filing of the notice of appeal with the Board; and

(5) Any additional information considered pertinent.

Within the same time above specified the (3/M) shall furnish the appellant a copy of each document he transmits to the Board, except those in subparagraph (a)(2) above. As to the latter, a list furnished appellant indicating specific contractual documents transmitted will suffice.

(b) Duties of the Appellant—Within 30 days after receipt of a copy of the appeal file assembled by the contracting officer, the appellant shall transmit to the Board any documents not contained therein which he considers pertinent to the appeal, and furnish two copies of such documents to the Government trial attorney.

(c) Organization of Appeal File—Documents in the appeal file may be originals or legible facsimile or authenticated copies, and shall be arranged in chronological order where practicable, numbered sequentially, tabbed, and indexed to identify the contents of the file.

(d) Lengthy Documents—Upon request by either party, the Board may waive the requirement to furnish to the other party copies of bulky, lengthy, or out-of-size documents in the appeal file when inclusion would be burdensome. At the time a party files with the Board a document as to which such a waiver has been granted he shall notify the other party that the document or a copy is available for inspection at the offices of the Board or of the party filing same.

(e) Status of Documents in Appeal File—Documents contained in the appeal file are considered, without further action by the parties, as part of the record upon which the Board will render its decision. However, a party may object to consideration of a particular document or all documents in advance of hearing or of settling the record in the event there is no hearing on the appeal. If such objection is made, the Board will rule upon admissibility into the record as evidence in accordance with Rules 13 and 20 hereof.

5. *Dismissal for Lack of Jurisdiction*

Any motion addressed to the jurisdiction of the Board shall be promptly filed. Hearing on the motion shall be afforded on application of either party. However, the Board may determine that its decision on the motion will be deferred pending hearing on both the merits and the motion. The Board shall have the right at any time and on its own motion to raise the issue of its jurisdiction to proceed with a particular case, and shall do so by an appropriate order, affording the parties an opportunity to be heard thereon.

6. *Pleadings*

(a) Appellant—Within 30 days after receipt of notice of docketing of the appeal, the appellant shall file with the Board an original and two copies of a complaint setting forth simple, concise and direct statements of each of its claims. Appellant shall also set forth the basis, with appropriate reference to contract provisions, of each claim and the dollar amount claimed. The pleading shall fulfill the generally recognized requirements of a complaint, although no particular form or formality is required. Upon receipt of the complaint, the Board shall serve a copy of it upon the Government. Should the complaint not be received within 30 days, appellant's claim and appeal may, if in the opinion of the Board the issues before the Board are sufficiently defined, be deemed to set forth its complaint and the Government shall be so notified.

(b) Government—Within 30 days from receipt of the complaint, or the aforesaid notice from the Board, the Government shall prepare and file with the Board an original and two copies of an answer thereto. The answer shall set forth simple, concise and direct statements of Government's defenses to each claim asserted by appellant. This pleading shall fulfill the generally recognized requirements of an answer, and shall set forth any affirmative defenses or counter-claims as appropriate. Upon receipt of the answer, the Board shall serve a copy upon appellant. Should the answer not be received within 30 days, the Board may, in its discretion, enter a general denial on behalf of the Government, and the appellant shall be so notified.

7. *Amendments of Pleadings or Record*

The Board upon its own initiative or upon application by a party may, in its discretion, order a party to make a more definite statement of the complaint or answer, or to reply to an answer.

The Board may, in its discretion, and within the proper scope of the appeal, permit either party to amend its pleading upon conditions fair to both parties. When issues within the proper scope of the appeal, but not raised by the pleadings or the documentation described in Rule 4, tried by express or implied consent of the parties, or by permission of the Board, they shall be treated in all respects as if they had been raised therein. In such instances, motions to amend the pleadings to conform to the proof may be entered, but are not required. If evidence is objected to at a hearing on the ground that it is not within the issues raised by the pleadings or the Rule 4 documentation (which shall be deemed part of the pleadings for this purpose), it may be admitted within the proper scope of the appeal, provided, however, that the objecting party may be granted a continuance if necessary to enable it to meet such evidence.

8. *Hearing Election*

After filing of Government's answer or notice from the Board that it has entered a general denial on behalf of the Government, each party shall advise whether it desires a hearing as prescribed in Rules 17 through 25, or whether, it elects to submit its case on the record without a hearing, as prescribed in Rule 11.

9. *Prehearing Briefs*

Based on an examination of the documentation described in Rule 4, the pleadings, and its determination of whether the arguments and authorities addressed to the issues are adequately set forth therein, the Board may, in its discretion, require the parties to submit prehearing briefs in any case in which a hearing has been elected pursuant to Rule 8. If the Board does not require prehearing briefs either party may, in its discretion and upon appropriate and sufficient notice to the other party, furnish a prehearing brief to the Board. In any case where a prehearing brief is submitted, it shall be furnished so as to be received by the Board at least 15 days prior to the date set for hearing, and a copy shall simultaneously be furnished to the other party as previously arranged.

10. *Prehearing or Presubmission Conference.*

Whether the case is to be submitted pursuant to Rule 11, or heard pursuant to Rules 17 through 25, the Board may upon its own initiative, or upon the application of either party, call upon the parties to appear before an Administrative Judge or examiner of the Board for a conference to consider:

(a) Simplification or clarification of the issues;

(b) The possibility of obtaining stipulations, admissions, agreements on documents, and understandings on matters already of record, or similar agreements that will avoid unnecessary proof;

(c) Limitation of the number of expert witnesses, or avoidance of similar cumulative evidence;

(d) The possibility of agreement disposing of any or all of the issues in dispute; and

(e) Such other matters as may aid in the disposition of the appeal.

The results of the conference shall be reduced to writing by the Administrative Judge or examiner and this writing shall thereafter constitute part of the record.

11. *Submission Without a Hearing*

Either party may elect to waive a hearing and to submit its case upon the record before the Board, as settled pursuant to Rule 13. Submission of a case without hearing does not relieve the parties from the necessity of proving the facts supporting their allegations or defenses. Affidavits, depositions, admissions, answers to interrogatories, and stipulations may be employed to supplement other docmentary evidence in the Board record. The Board may permit such submission to be supplemented by oral argument (transcribed if requested), and by briefs arranged in accordance with Rule 23.

12. *Optional SMALL CLAIMS (EXPEDITED) and ACCELERATED Procedures. These procedures are available solely at the election of the appellant.*

12.1. *Elections to Utilize SMALL CLAIMS (EXPEDITED) and ACCELERATED Procedure.*

(a) In appeals where the amount in dispute of $10,000 or less, the appellant may elect to have the appeal processed under a SMALL CLAIMS (EXPEDITED) procedure requiring decision of the appeal, whenever possible, within 120 days after the Board receives written notice of the appellant's election to utilize this procedure. The details fo this procedure appear in section 12.2 of this Rule. An appellant may elect the ACCELERATED procedure rather than the SMALL CLAIMS (EXPEDITED) procedure for any appeal eligible for the SMALL CLAIMS (EXPEDITED) procedure.

(b) In appeals where the amount in dispute is $50,000 or less, the appellant may elect to have the appeal processed under an ACCELERATED procedure requiring decision of the appeal, whenever possible, within 180 days after the Board receives written notice of the appellant's election to utilize this procedure. The details of this procedure appear in section 12.3 of this Rule.

(c) The appellant's election of either the SMALL CLAIMS (EXPEDITED) procedure or the ACCELERATED procedure may be made either in his notice of appeal or by other written notice at any time thereafter.

(d) In deciding whether the SMALL CLAIMS (EXPEDITED) procedure or the ACCELERATED procedure is applicable to a given appeal, the Board shall determine the amount in dispute by adding the amount claimed by the appellant against the Government to the amount claimed by Government against the appellant. If either party making a claim against the other party does not otherwise state in writing the amount of its claim, the amount claimed by such party shall be the maximum amount which such party represents in writing to the Board that it can reasonably expect to recover against the other.

12.2 *The SMALL CLAIMS (EXPEDITED) Procedure.*

(a) This procedure shall apply only to appeals where the amount in dispute is $10,000 or less as to which the appellant has elected the SMALL CLAIMS (EXPEDITED) procedure.

(b) In cases proceeding under the SMALL CLAIMS (EXPEDITED) procedure, the following time periods shall apply: (1) Within ten days from the respondent's first receipt from either the appellant or the Board of a copy of the appellant's notice of election of the SMALL CLAIMS (EXPEDITED) procedure, the respondent shall send the Board a copy of the contract, the contracting officer's final decision, and the appellant's claim letter or letters, if any; (2) within 15 days after the Board has acknowledged receipt of the notice of election, either party desiring an oral hearing shall so inform the Board. If either party requests an oral hearing, the Board shall promptly schedule such a hearing for a mutually convenient time consistent with administrative due process and the 120-day limit for a decision, at a place determined under Rule 17. If a hearing is not requested by either party within the time prescribed by this Rule, the appeal shall be deemed to have been submitted under Rule 11 without a hearing.

(c) In cases proceeding under the SMALL CLAIMS (EXPEDITED) procedure, pleadings, discovery, and other prehearing activity will be allowed only as consistent with the requirement to conduct the hearing on the date scheduled or, if no hearing is scheduled, to close the record on a date that will allow decision within the 120 limit. The Board, in its discretion, may shorten time periods prescribed elsewhere in these Rules as necessary to enable the Board to decide the appeal within 120 days after the Board has received the appellant's notice of election of the SMALL CLAIMS (EXPEDITED) procedure. In so doing the Board may reserve whatever time up to 30 days it considers necessary for preparation of the decision.

(d) Written decision by the Board in cases processed under the SMALL CLAIMS (EXPEDITED) procedure will be short and contain only summary findings of fact and conclusions. Decisions will be rendered for the Board by a single Administrative Judge. If there has been a hearing, the Administrative Judge presiding at the hearing may, in his discretion, at the conclusion of the hearing and after entertaining such oral arguments as he deems appropriate, render on the record oral summary findings of fact, conclusions, and a decision of the Appeal. Whenever such an oral decision is rendered, the Board will subsequently furnish the parties a typed copy of such oral decision for record and payment purposes and to establish the date of commencement of the period for filing a motion for reconsideration under Rule 29.

(e) Decisions of the Board under the SMALL CLAIMS (EXPEDITED) procedure will not be published, will have no value as precedents, and, in the absence of fraud, cannot be appealed.

12.3. *The ACCELERATED Procedure*

(a) This procedure shall apply only to appeals where the amount in dispute is $50,000 or less as to which the appellant has made the requisite election.

(b) In cases proceeding under the ACCELERATED procedure, the parties are encouraged, to the extent possible consistent with adequate presentation of their factual and legal positions, to waive pleadings, discovery, and briefs. The Board, in its discretion, may shorten time periods prescribed elsewhere in these Rules as necessary to enable the Board to decide the appeal within 180 days after the Board has received the appellant's notice of election of the ACCELERATED procedure, and may reserve 30 days for preparation of the decision.

(c) Written decisions by the Board in cases processed under the ACCELERATED procedure will normally be short and contain only summary findings of act and conclusions. Decisons will be rendered for the board by a single Administrative Judge with the concurrence of the Chairman or a Vice Chairman or other disignated Administrative Judge, or by a majority among these two and an additional designated member in case of disagreement. Alternatively, in cases where the amount in dispute is $10,000 or less as to which the ACCELERATED procedure has been elected and in which there has been a hearing, the single Administrative Judge presiding at the hearing may, with the concurrence of both parties, at the conclusion of the hearing and after enteraining such oral arguments as he deems appropriate, render on the record oral summary findings of fact, conclusions, and a decision of the appeal. Whenever such an oral decision is rendered, the Board will subsequently furnish the parties a typed copy of such oral decison for record and payment purposes and to establish the date of commencement of the period for filing a motion for reconsderation under Rule 29.

12.4. *Motions for Reconsideration in Rule 12 cases*

Motions for Reconsideration of cases decided under either the SMALL CLAIMS (EXPEDITED) procedue or the ACCELERATED procedure need not be decided within the time periods prescribed by this Rule 12 for the initial decision of the appeal, but all such motions shall be processed and decided rapidly so as to fulfill the intent of this Rule.

13. *Settling the Record*

(a) The record upon which the Board's decision will be rendered consists of the appeal file described in Rule 4 and, to the extent the following items have been filed, pleadings, prehearing conference memoranda or orders, prehearing briefs, depositions or interrogatories received in evidence, admissions, stipulations, transcripts of conferences and hearings, hearing exhibits, posthearing briefs, and documents which the board has specifically designated be made a part of the record. The record will, at all resonable times, be available for inspection by the parties at the office of the Board.

(b) Except as the Board may otherwise order in its discretion, no proof shall be received in evidence after completion of an oral hearing or, in cases submitted on the record, after notification by the Board that the case is ready for decision.

(c) The weight to be attached to any evidence of record will rest within the sound discretion of the Board. The Board may in any case require either party, with appropriate notice to the other party, to submit additional evidence on any matter relevant to the appeal.

14. *Discovery—Depositions*

(a) General Policy and Protective Orders—The parties are encouraged to engage in voluntary discovery procedures. In connection with any deposition or other discovery procedure, the board may make any order required to protect a party or person from annoyance, embarrassment, or undue burden or expense. Those orders may include limitations on the scope, method, time and place for discovery, and provisions for protecting the secrecy of confidential information or documents.

(b) When Depositions Permitted—After an appeal has been docketed and complaint filed, the parties may mutually agree to, or the Board may, upon application of either party, order the taking of testimony of any person by deposition upon oral examination or written interrogatories before any officer authorized to administer oaths at the place of examination, for use as evidence or for purpose of discovery. The application for order shall specify whether the purpose of the deposition is discovery or for use as evidence.

(c) Orders on Depositions—The time, place, and manner of taking depositions shall be as mutually agreed by the parties, or failing such agreement, governed by order of the Board.

(d) Use as Evidence—No testimony taken by depositions shall be considered as part of the evidence in the hearing of an appeal until such testimony is offered and received in evidence at such hearing. It will not ordinarily be received in evidence if the deponent can testify at the hearing. In such instances, however, the deposition may be used to contradict or impeach the testimony of the deponent given at the hearing. In cases submitted on the record, the Board may, in its discretion, receive depositions to supplement the record.

(e) Expenses—Each party shall bear its own expenses associated with the taking of any deposition.

(f) Subpoenas—Where appropriate, a party may request the issuance of a subpoena under the provisions of Rule 21.

15. *Interrogatories to Parties, Admission of Facts, and Production and Inspection of Documents*

(a) Interrogatories to parties—After an appeal has been filed with the Board, a party may serve on the other party written interrogatories to be answered separately in writing, signed under oath and returned within 30 days. Upon timely objection by the party, the Board will determine the extent to which the interrogatories will be permitted.

(b) Admission of facts—After an appeal has been filed with the Board, a party may serve upon the other party a request for the admission of specified facts. Within 30 days after service, the party served shall answer each requested fact or file objections thereto. The factual propositions set out in the request shall be deemed admitted upon the failure of a party to respond to the request for admission.

(c) Production and inspection of documents—Upon motion of any party showing good cause therefor, and upon notice, the Board may order the other party to produce and permit the inspection and copying or photographing of any documents or objects, not privileged, which are reasonably calculated to lead to the discovery of admissible evidence. If the parties cannot agree thereon, the Board shall specify terms and conditions in making the inspection and taking the copies and photographs.

16. *Service of Papers Other than Subpoenas*

Papers shall be served personally or by mail, addressed to the party upon whom service is to be made. Copies of complaints, answers and simultaneous briefs shall be filed directly with the Board. The party filing any other paper with the Board shall send a copy thereof to the opposing party, noting on the paper filed with the Board that a copy has been so furnished. Subpoenas shall be served as provided in Rule 21.

Hearings

17. *Where and When Held*

Hearings will ordinarily be held in he Washington, D.C. area. however, pon timely request and for good ause, the Board may set the hearing t another location. Hearings will be cheduled at the discretion of the Board with due consideration to the egular order of appeals and other perinent factors. On request or motion by either party and for good cause, the Board may, in its discretion, advance a hearing.

18. *Notice of Hearings*

The parties shall be given at least 15 days notice of the time and place set or hearings. In scheduling hearings, he Board will consider the desires of he parties and the requirement for just and inexpensive determination of appeals without unnecessary delay. Notices of hearing shall be promptly acknowledged by the parties.

19. *Unexcused Absence of a Party*

The unexcused absence of a party at the time and place set for hearing will not be occasion for delay. In the event of such absence, the hearing will proceed and the case will be regarded as submitted by the absent party as provided in Rule 11.

20. *Hearings: Nature; Examination of Witnesses*

(a) *Nature of Hearings.* Hearings shall be as informal as may be reasonable and appropriate under the circumstances. Appellant and respondent may offer such relevant evidence as they deem appropriate and as would be admissible under the Federal Rules of Evidence, subject, however, to the sound discretion of the presiding Administrative Judge or examiner in supervising the extent and manner of presentation of such evidence. In general, admissibility will depend on relevancy and materiality. Evidence which may not be admissible under the Federal Rules of Evidence may be admitted in the discretion of the presiding Administrative Judge or examiner. The weight to be attached to evidence presented in any particular form will be within the dscretion of the Board. Stipulations of fact agreed upon by the parties may be regarded and used as evidence at the hearing. The parties may stipulate the testimony that would be given by a witness if the witness were present. The Board may require evidence in addition to that offered by the parties.

(b) *Examination of Witnesses.* Witnesses before the Board will be examined orally under oath or affirmation, unless the presiding Administrative Judge or examiner shall otherwise order. If the testimony of a witness is not given under oath, the Board may advise the witness that his statements may be subject to the provisions of Title 18, United States Code, sections 287 and 1001, and any other provision of law imposing penalties for knowingly making false representations in connection with claims against the United States or in any matter within the jurisdiction of any department or agency thereof.

21. *Subpoenas*

(a) *General*

Upon written request of either party filed with the (clerk, recorder), or on his own motion, the Administrative Judge to whom a case is assigned or who is otherwise designated by the Chairman may issue a subpoena requiring:

(i) *Testimony at a deposition*—the deposing of a witness in the city or country where he resides or is employed or transacts his business in person, or at another location convenient for him that is specifically determined by the Board;

(ii) *Testimony at a hearing*—the attendance of a witness for the purpose of taking testimony at a hearing; and

(iii) *Production of books, papers, documents, or tangible things*—in addition to (i) or (ii), the production by the witness at the deposition or hearing of relevant books, papers, documents, or tangible things designated in the subpoena.

(b) *Voluntary Cooperation*

Each party is expected (i) to cooperate and make available witnesses and books, papers, documents, or tangible things under its control as requested by the other party, without issuance of a subpoena, and (ii) to secure voluntary attendance of desired third-party witness and production of desired third-party books, papers, documents, or tangible things whenever possible.

(c) *Requests for Subpoenas*

(1) A request for a subpoena shall normally be filed at least:

(i) 15 days before a scheduled deposition where the attendance of a witness at a deposition is sought;

(ii) 30 days before a scheduled hearing where the attendance of a witness at a hearing is sought.

In its discretion the Board may honor requests for subpoenas not made within these time limitations.

(2) A request for a subpoena shall state the reasonable scope and general relevance to the case of the testimony and of any books, papers, documents, or tangible things sought.

(d) *Requests to Quash or Modify*

Upon written request by the person subpoenaed or by a party, made within 10 days after service but in any event not later than the time specified in the subpoena for attendance, the Board may (i) quash or modify the subpoena if it is unreasonable and oppressive or for other good cause shown, or (ii) require the person in whose behalf the subpoena was issued to advance the reasonable cost of producing subpoenaed books, papers, documents, or tangible things. Where circumstances require, the Board may act upon such a request at any time after a copy has been served upon the opposing party.

(e) *Form; Issuance*

(1) Every subpoena shall state the name of the Board and the title of the appeal, and shall command each person to whom it is directed to attend and give testimony, and if appropriate, to produce specified books, papers, documents, or tangible things, at a time and place therein specified. In issuing a subpoena to a requesting party, the Administrative Judge shall sign the subpoena and may, in his discretion, enter the name of the witness and otherwise leave it blank. The party to whom the subpoena is issued shall complete the subpoena before service.

(2) Where the witness is located in a foreign country, a letter rogatory or subpoena may be issued and served under the circumstances and in the manner provided in 28 U.S.C. 1781-1784.

(f) *Service*

(1) The Administrative Judge may arrange for service of the subpoenas or may release them to the parties for service.

(2) A subpoena requiring the attendance of a witness at a deposition or hearing may be served at any place. A subpoena may be served by a United States marshal or his deputy, or by any other person who is not a party and not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by personally delivering a copy to him and tendering to him the fees for one day's attendance and the mileage provided by 28 U.S.C. 1821 or other applicable law.

(3) The party at whose instance a subpoena is issued shall be responsible for the payment of fees and mileage of the witness and of the officer who serves the subpoena. The failure to make payment of such charges on demand may be deemed by the Board as a sufficient ground for striking the testimony of the witness and the books, papers, documents, or tangible things he has produced.

(g) *Contumacy or Refusal to Obey a Subpoena*

In case of contumacy or refusal to obey a subpoena by a person who resides, is found, or transacts business within the jurisdiction of a United States District Court, the Board will apply to the court through the Attorney General of the United States for an order requiring the person to appear before the Board or a member thereof to give testimony or produce evidence or both. Any failure of any such person to obey the order of the court may be punished by the court as a contempt thereof.

22. *Copies of Papers*

When books, records, papers, or documents have been received in evidence, a true copy thereof or of such part thereof as may be material or relevant may be substituted therefor, during the hearing or at the conclusion thereof.

23. *Posthearing Briefs*

Posthearing Briefs may be submitted upon such terms as may be agreed upon by the parties and the presiding Administrative Judge or examiner at the conclusion of the hearing. Ordinarily, they will be simultaneous briefs, exchanged within 30 days after receipt of transcript.

24. *Transcript of Proceedings*

Testimony and argument at hearings shall be reported verbatim, unless the Board otherwise orders. Transcripts or copies of the proceedings shall be supplied to the parties at such rates as may be fixed by (   ).

25. *Withdrawal of Exhibits*

After a decision has become final the Board may, upon request and after notice to the other party, in its discretion permit the withdrawal of original exhibits, or any part thereof, by the party entitled thereto. The substitution of true copies of exhibits or any part thereof may be required by the Board in its discretion as a condition of granting permission for such withdrawal.

Representation

26. *The Appellant*

An individual appellant may appear before the Board in person, a corporation by one of its officers; and a partnership or joint venture by one of its members; or any of these by an attorney at law duly licensed in any state, commonwealth, territory, or in the District of Columbia. An attorney representing an appellant shall file a written notice of appearance with the Board.

27. *The Government*

Government counsel may, in accordance with their authority, represent the interest of the Government before the Board. They shall file notices of appearance with the Board, and notice thereof will be given appellant or his attorney in the form specified by the Board from time to time. Whenever appellant and the Government counsel are in agreement as to disposition of the controversy, the Board may suspend further processing of the appeal. However, if the Board is advised thereafter by either party that the controversy has not been disposed of by agreement, the case shall be restored to the Board's calendar without loss of position.

Decisions

28. *Decisions*

Decisions of the Board will be made in writing and authenticated copies of the decision will be forwarded simultaneously to both parties. The rules of the Board and all final orders and decisions shall be open for public inspection at the offices of the Board in Washington, D.C. Decisions of the Board will be made solely upon the record, as described in Rule 13.

Motion for Reconsideration

29. *Motion for Reconsideration*

A motion for reconsideration may be filed by either party. It shall set forth specifically the grounds relied upon to sustain the motion. The motion shall be filed within 30 days from the date of the receipt of a copy of the decision of the Board by the party filing the motion.

Dismissals

30. *Dismissal Without Prejudice*

In certain cases, appeals docketed before the Board are required to be placed in a suspense status and the Board is unable to proceed with disposition thereof for reasons not within the control of the Board. Where the suspension has continued, or may continue, for an inordinate length of time, the Board may, in its discretion, dismiss such appeals from its docket without prejudice to their restoration when the cause of suspension has been removed. Unless either party or the Board acts within three years to reinstate any appeal dismissed without prejudice, the dismissal shall be deemed with prejudice.

31. *Dismissal for Failure to Prosecute*

Whenever a record discloses the failure of either party to file documents required by these rules, respond to notices or correspondence from the Board, comply with orders of the Board, or otherwise indicates an intention not to continue the prosecution or defense of an appeal, the Board may issue an order requiring the offending party to show cause why the appeal should not be either dismissed or granted, as appropriate. If no cause is shown, the Board may take appropriate action.

ExParte Communications

32. No member of the Board or of the Board's staff shall entertain, nor shall any person directly or indirectly involved in an appeal submit to the Board or the Board's staff, off the record, any evidence, explanation, analysis, or advice, whether written or oral, regarding any matter at issue in an appeal. This provision does not apply to consultation among Board members nor to exparte communications concerning the Board's administrative functions or procedures.

Sanctions

33. If any party fails or refuses to obey an order issued by the Board, the Board may then make such order as it considers necessary to the just and expeditious conduct of the appeal.

Effective Date

34. These rules shall take effect on March 1, 1979.

Proposed Regulatory Coverage and Contract Clause

I. REGULATORY COVERAGE—DISPUTES PROCEDURE

Section 1-314 of the Defense Acquisition Regulation and Section 1-1.318 of the Federal Procurement Regulations are amended to provide as follows:

1. Contractor claims against the Government.

(a) As used in connection with this disputes procedure—

(1) "Misrepresentation of fact" means a false statement of substantive fact, or any conduct which leads to a belief of a substantive fact material to proper understanding of the matter in hand, made with intent to deceive or mislead.

(2) "Claim" means a written demand for a decision of the contracting officer pursuant to the Contract Disputes Act of 1978, 41 U.S.C. 601, *et. seq.*

2. (a) Only a written submission shall constitute a claim by the contractor. The claim shall include the amount or other relief sought and appropriate supporting data. In the case of claims or amendments to claims exceeding $50,000, or with any amendment causing the total claim to exceed $50,000, the Contractor shall certify, when the Contracting Officer and the Contractor agree that the claim is ready for a decision under (f) below, as follows:

> I certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of my knowledge and belief; and that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable.

Contractor's Name ____________

Title ____________

(b) The Government shall pay the contractor interest—

(1) On the amount found due on claims;

(2) At the rate fixed by the Secretary of the Treasury, under the Renegotiation Act, Public Law 92-41, in effect on the date the Contracting Officer receives a claim;

(3) From the date payment is due or the Contracting Officer receives the

claim, whichever is later, until the Government makes payment.

(c) If a contractor cannot support any of its claim as a result of fraud or misrepresentation of fact, then, in addition to whatever remedies or penalties may otherwise be provided by law, the Contractor shall—

(1) Pay the Government an amount equal to the unsupported part of the claim;

(2) Pay all Government costs attributable to reviewing that part of the claim;

(d) Agencies shall report all instances of suspected fraudulent claims using the procedures in (———).

(e) The Contracting Officer shall give the Contractor a decision in accordance with (f) below on any unsatisfied Government demand against the Contractor relating to the contractor.

(f) Contracting Officer's decision.

(1) When a claim cannot be satisfied or settled by agreement and a decision on the claim is necessary the Contracting Officer shall:

(i) Review the facts pertinent to the claim;

(ii) Secure assistance from legal and other advisors;

(iii) Coordinate with the contract administration office or contracting office, when appropriate.

(iv) Furnish a copy of the decision to the contractor, by certified mail, return receipt requested, or any other method that provides evidence of receipt; and

(v) Include in the final decision:

(A) A paragraph substantially as follows: This is the final decision of the Contracting Officer. This decision may be appealed to the cognizant Board of Contract Appeals. If you decide to make such an appeal you must mail or otherwise furnish written notice thereof to the Contracting Officer, and to the Board under its Rules, within ninety days from the date you receive this decision. The notice shall indicate that an appeal is intended, should reference this decision, and identify the contract by number. In lieu of appealing to the cognizant Board of Contract Appeals you may bring an action directly in the U.S. Court of Claims, within twelve months of the date you receive this decision.

(B) A description of the claim or dispute;

(C) A reference to pertinent contract provisions;

(D) A statement of the factual areas of agreement or disagreement.

(E) A statement of the contracting officer's decision, with supporting rationale.

(F) Notification that the small claims procedure of the cognizant Board shall be applicable at the sole election of the contractor in the event the amount in dispute as a result of the final decision is $10,000 or less.

(G) Notification that the accelerated procedure of the cognizant Board shall be applicable at the sole election of the contractor in the event the amount in dispute as a result of the final decision is $50,000 or less.

(vi) Issue the decision within the following statutory time limitations:

(A) For claims not exceeding $50,000: Sixty days after receipt of the claim.

(B) For submitted claims exceeding $50,000: Sixty days after receipt of claim; provided, however, if a decision is not issued within sixty days the contracting officer shall notify the contractor of the time within which he will make the decision. The reasonableness of this time period will depend on the size and complexity of the claim and the adequacy of the contractor's supporting data and any other relevant factors.

(g) The amount determined payable pursuant to the decision, less any portion already paid, normally should be paid without awaiting contractor action concerning appeal. Such payment shall be without prejudice to the rights of either party.

(h) These procedures do not affect the rights or authority of the Government regarding any demand or dispute for penalties or forfeitures prescribed by statute or regulation that any agency is specifically authorized to administer, settle, or determine, nor do they apply to requests for relief under Pub. L. 85-804.

(i) Informal Administrative Conference.

(1) At any time prior to an appeal to a Board of Contract Appeals or suit in court, an agency shall afford a contractor at least one opportunity for an informal conference with the agency for the purpose of considering the possibility of disposing of the claim by mutual agreement.

(2) This conference shall be held within thirty days of the request for such conference, or later as mutually agreeable between the contractor and the agency head or his designee. The conference shall be conducted by a designee or designees of the agency head selected from a level above the office to which the contracting officer is attached, who, if feasible, shall not have participated substantially in any prior decision on the claim.

(3) The conferees may consider any material, written or oral, relevant to the claim, but testimony or evidence shall not be taken. Any documentary materials or oral statements submitted during the conference shall not be evidence in any subsequent appeal or suit in court on the claims unless offered anew and admissible under applicable rules of evidence. Any offers of settlement or compromise during or resulting from the conference shall be without prejudice and shall not be evidence or referred to in any subsequent appeal or suit in court on the claim.

(4) If the agency conferees determine that the claim or dispute should be settled, compromised, paid, or otherwise adjusted by mutual agreement, they shall make a written report to the agency head within thirty days of the conference detailing the basis for their determination and recommending exercise of his settlement authority. The agency head shall act pursuant to his settlement authority within sixty days, or later if mutually agreeable between the contractor and the agency head, after receiving the agency conferees' report and recommendations.

(5) A request for a conference with the agency does not affect the time for commencement of a contractor's appeal to the agency board of contract appeals or filing a suit in court. However, an agency board shall stay further proceedings whenever a timely requested conference has not been conducted at the time the contractor files an appeal with the agency board until the conference is held or waived by the contractor.

II. DISPUTES CLAUSE

1. Section 7-103.12 of the Defense Acquisition Regulation and Section 1—7.102-12 of the Federal Procurement Regulation are amended to provide as follows:

The Contracting Officer shall insert the following clause in all contracts unless exempted by the head of the agency under 41 U.S.C. 603(c).

Disputes Clause

(a) If this contract is subject to the Contract Disputes Act of 1978, (41 U.S.C. 601, et. seq.) any dispute or claim relating to this contract shall be resolved in accordance with the provisions of that Act.

(b) On request, the contracting officer shall promptly furnish the contractor a copy of the regulations and procedures applicable to the resolution of claims and disputes relating to this contract.

(c) The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal or action related to the contract, and comply with any decision of the Contracting Officer rendered pursuant to the Contract Disputes Act of 1978.

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INTERIM FINAL RULES OF PROCEDURE FOR BOARDS OF CONTRACT APPEALS AND RELATED REGULATIONS

Office of Federal Procurement Policy

44 Fed. Reg. 12519 (March 7, 1979)

[3310-01-M]

OFFICE OF MANAGEMENT AND BUDGET

Office of Federal Procurement Policy

UNIFORM RULES OF PROCEDURE FOR BOARDS OF CONTRACT APPEALS AND RELATED REGULATIONS

Interim Final Rules

FEBRUARY 26, 1979.

AGENCY: Office of Federal Procurement Policy (OFPP), Office of Management and Budget.

ACTION: Notice of Interim Final Uniform Rules of Procedure for Boards of

Contract Appeals and related regulations.

SUMMARY: This document sets out the text of interim rules which boards of contract appeals must adopt as well as rules which the Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration must incorporate in their procurement regulations.

On November 1, 1978, the President signed into law Pub. L. 95-563, the "Contract Disputes Act of 1978." That Act, among other things requires changes to the Rules of Procedure currently in use by the Boards of Contract Appeals of the procuring agencies, as well as certain other changes in contract clauses and procurement regulations by March 1, 1979. Proposed Rules of Procedure and related regulations were published for comment in the January 25, 1979, FEDERAL REGISTER. The Interim final Rules and regulations set forth below incorporate the changes required by Pub. L. 95-563, and reflect many of the comments received on the proposed Rules and regulations. Some of the changes to the Rules and regulations made as a result of comments received are significant. These Rules and regulations are therefore issued as implementation of Pub. L. 95-563, effective on March 1, 1979, on an interim basis, and will automatically become final on June 1, 1979 unless changed before that time. This will enable the Office of Federal Procurement Policy to evaluate additional comments on the Interim Rules and regulations. The Rules of Procedure are to be adopted uniformly by all Boards of Contract Appeals.

DATE: These Interim Rules and regulations are effective on March 1, 1979.

FOR FURTHER INFORMATION CONTACT:

Mr. Owen Birnbaum, Deputy Associate Administrator for Acquisition Law, (202) 395-3455.

LESTER A. FETTIG,
Administrator.

RULES OF PROCEDURE FOR BOARDS OF CONTRACT APPEALS

PREFACE TO RULES

I. *Jurisdiction for considering appeals.*

The —— Board of Contract Appeals (referred to herein as the "Board") shall consider and determine appeals from decisions of contracting officers pursuant to the Contract Disputes Act of 1979 (Pub. L. 95-563, 41 U.S.C. 601-613) relating to contracts made by (i) the —— (executive agency) or (ii) any other executive agency when such agency or the Administrator for Federal Procurement Policy has designated the Board to decide the appeal.

II. *Organization and location of the Board.*

(a) The Board's address is (——), telephone (——).

(b) The Board consists of a Chair, Vice Chair, and other members, all of whom are attorneys at law duly licensed by any state, commonwealth, territory, or the District of Columbia. In general, the appeals are assigned to a panel of as least (——) members who decide the case by a majority vote. Board Members are designated Administrative Judges.

III. *Time, Computation, and Extensions.*

(a) Where possible, procedural actions should be taken in less time than the maximum time allowed. Where appropriate and justified, however, extension of time will be granted. All requests for extensions of time shall be in writing.

(b) In computing any period of time, the day of the event from which the designated period of time begins to run shall not be included, but the last day of the period shall be included unless it is a Saturday, Sunday, or a legal holiday, in which event the period shall run to the end of the next business day.

IV. *ExParte Communications.*

No member of the Board or of the Board's staff shall entertain, nor shall any person directly or indirectly involved in an appeal, submit to the Board or the Board's staff, off the record, any evidence, explanation, analysis, or advice, whether written or oral, regarding any matter at issue in an appeal. This provision does not apply to consultation among Board members nor to exparte communications concerning the Board's admininstrative functions or procedures.

RULES

Preliminary Procedures

1. *Appeals, How Taken.* (a) Notice of an

appeal shall be in writing and mailed or otherwise furnished to the Board within 90 days from the date of receipt of a contracting officer's decision. A copy thereof shall be furnished to the contracting officer from whose decision the appeal is taken.

(b) Where the contractor has submitted a claim of $50,000 or less to the contracting officer and has requested a written decision within 60 days from receipt of the request, and the contracting officer has not done so, the contractor may file a notice of appeal as provided in subparagraph (a) above, citing the failure of the contracting officer to issue a decision.

(c) Where the contractor has submitted a claim in excess of $50,000 to the contracting officer and the contracting officer has failed to issue a decision within a reasonable time, the contractor may file a notice of appeal as provided in subparagraph (a) above, citing the failure to issue a decision.

(d) Upon docketing of appeals filed pursuant to (b) or (c) hereof, the Board may, at its option, stay further proceedings pending issuance of a final decision by the contracting officer within such period of time as is determined by the Board.

2. *Notice of Appeal, Contents of.* A notice of appeal should indicate that an appeal is being taken and should identify the contract (by number), the department and agency or bureau involved in the dispute, the decision from which the appeal is taken, and the amount in dispute, if known. The notice of appeal should be signed by the appellant (the contractor making the appeal), or by the appellant's duly authorized representative or attorney. The complaint referred to in Rule 6 may be filed with the notice of appeal, or the appellant may designate the notice of appeal as a complaint, if it otherwise fulfills the requirements of a complaint.

3. *Docketing of Appeals.* When a notice of appeal in any form has been received by the Board, it shall be docketed promptly. Notice in writing shall be given to the appellant with a copy of these rules, and to the contracting officer.

4. *Preparation, Content, Organization, Forwarding, and Status of Appeal File.* (a) Within 30 days of receipt of an appeal, or notice that an appeal has been filed, the contracting officer shall assemble and transmit to the Board: (1) the decision from which the appeal is taken; and (2) the contract including specifications and pertinent amendments, plans and drawings.

(b) These documents are considered, without further action by the parties, as part of the record upon which the Board will render its decision. However, a party may object to consideration of a particular document or all documents in advance of hearing or of settling the record in the event there is no hearing on the appeal. If such objection is made, the Board will rule upon admissibility into the record as evidence in accordance with Rules 13 and 20 hereof.

5. *Dismissal for Lack of Jurisdiction.* Any motion addressed to the jurisdiction of the Board shall be promptly filed. Hearing on the motion shall be afforded on application of either party. However, the Board may defer its decision on the motion pending hearing on both the merits and the motion. The Board shall have the right at any time and on its own initiative to raise the issue of its jurisdiction to proceed with a particular case, and shall do so by an appropriate order, affording the parties an opportunity to be heard thereon.

6. *Pleadings.* (a) Appellant—Within 30 days after receipt of notice of docketing of the appeal, the appellant shall file with the Board an original and two copies of a complaint setting forth simple, concise and direct statements of each of its claims. Appellant shall also set forth the basis, with appropriate reference to contract provisions, of each claim and the dollar amount claimed, to the extent known. This pleading shall fulfill the generally recognized requirements of a complaint, although no particular form is required. Upon receipt of the complaint, the Board shall serve a copy of it upon the Government. Should the complaint not be received withing 30 days, appellant's claim and appeal may, if in the opinion of the Board the issues before the Board are sufficiently defined, be deemed to set forth its complaint and the Government shall be so notified.

(b) Government—Within 30 days from receipt of the complaint, or the aforesaid notice from the Board, the Government shall prepare and file with the Board an original and two copies of an answer thereto. The answer shall set forth simple, concise and direct statements of Government's defenses to each claim asserted by appellant, including any affirmative defenses available. Upon receipt of the answer, the Board shall serve a copy upon appellant. Should the answer not be received within 30 days, the Board may, in its discretion, enter a general denial on behalf of the Government, and the appellant shall be so notified.

7. *Amendments of Pleadings or Record.* The Board upon its own initiative or upon

application by a party may order a party to make a more definite statement of the complaint or answer, or to reply to an answer. The Board may, in its discretion, and within the proper scope of the appeal, permit either party to amend its pleading upon conditions fair to both parties. When issues within the proper scope of the appeal, but not raised by the pleadings, are tried by express or implied consent of the parties, or by permission of the Board, they shall be treated in all respects as if they had been raised therein. In such instances, motions to amend the pleadings to conform to the proof may be entered, but are not required. If evidence is objected to at a hearing on the ground that it is not within the issues raised by the pleadings, it may be admitted within the proper scope of the appeal, provided, however, that the objecting party may be granted a continuance if necessary to enable it to meet such evidence.

8. *Hearing Election.* After filing of the Government's answer or notice from the Board that it has entered a general denial on behalf of the Government, each party shall advise whether it desires a hearing as prescribed in Rules 17 through 25, or whether it elects to submit its case on the record without a hearing, as prescribed in Rule 11.

9. *Prehearing Briefs.* Based on an examination of the pleadings, and its determination of whether the arguments and authorities addressed to the issues are adequately set forth therein, the Board may, in its discretion, require the parties to submit prehearing briefs in any case in which a hearing has been elected pursuant to Rule 8. If the Board does not require prehearing briefs either party may, in its discretion and upon appropriate and sufficient notice to the other party, furnish a prehearing brief to the Board. In any case where a prehearing brief is submitted, it shall be furnished so as to be received by the Board at least 15 days prior to the date set for hearing, and a copy shall simultaneously be furnished to the other party as previously arranged.

10. *Prehearing or Presubmission Conference.* (a) Whether the case is to be submitted pursuant to Rule 11, or heard pursuant to Rules 17 through 25, the Board may upon its own initiative, or upon the application of either party, arrange a telephone conference or call upon the parties to appear before an Administrative Judge or examiner of the Board for a conference to consider:

(1) simplification, clarification, or severing of the issues;

(2) the possibility of obtaining stipulations, admissions, agreements and rulings on admissibility of documents, understandings on matters already of record, or similar agreements that will avoid unnecessary proof;

(3) agreements and rulings to facilitate discovery;

(4) limitation of the number of expert witnesses, or avoidance of similar cumulative evidence;

(5) the possibility of agreement disposing of any or all of the issues in dispute; and

(6) such other matters as may aid in the disposition of the appeal.

(b) The Administrative Judge or examiner of the Board shall make such rulings and orders as may be appropriate to achieve settlement by agreement of the parties or to aid in the disposition of the appeal. The results of pretrial conferences, including any rulings and orders, shall be reduced to writing by the Administrative Judge or examiner and this writing shall thereafter constitute a part of the record.

11. *Submission Without a Hearing.* Either party may elect to waive a hearing and to submit its case upon the record before the Board, as settled pursuant to Rule 13. Submission of a case without hearing does not relieve the parties from the necessity of proving the facts supporting their allegations or defenses. Affidavits, depositions, admissions, answers to interrogatories, and stipulations may be employed to supplement other documentary evidence in the Board record. The Board may permit such submission to be supplemented by oral argument (transcribed if requested), and by briefs arranged in accordance with Rule 23.

12. *Optional Small Claims (Expedited) and Accelerated Procedures. These procedures are available solely at the election of the appellant.*

12.1. *Elections to Utilize Small Claims (Expedited) and Accelerated Procedure.* (a) In appeals where the amount in dispute is $10,000 or less, the appellant may elect to have the appeal processed under a Small Claims (Expedited) procedure requiring decision of the appeal, whenever possible, within 120 days after the Board receives written notice of the appellant's election. The details of this procedure appear in section 12.2 of this Rule.

(b) In appeals where the amount in dispute is $50,000 or less, the appellant may elect to have the appeal processed under an Accelerated procedure requiring decision of the appeal, whenever possible, within 180 days after the Board receives written notice of the appellant's election. The details of this procedure appear in section 12.3 of this

Rule.

(c) The appellant's election of either the Small Claims (Expedited) procedure or the Accelerated procedure may be made by written notice within 20 days after receipt of notice of docketing the appeal unless such period is extended by the Board for good cause. The election may not be withdrawn except with permission of the Board and for good cause.

(d) In deciding whether the Small Claims (Expedited) procedure or the Accelerated procedure is applicable to a given appeal, the Board shall determine the amount in dispute.

12.2. *The Small Claims (Expedited Procedure.* (a) Promptly upon receipt of an appellant's election of the *Small Claims (Expedited)* procedure, the assigned Administrative Judge shall take the following actions, if feasible, in an informal meeting or a telephone conference with both parties: (i) identify and simplify the issues; (ii) establish a simplified procedure appropriate to the particular appeal involved; (iii) determine whether the appellant wants a hearing, and if so, fix a time and place therefor; (iv) require the Government to furnish all correspondence between the parties pertinent to the appeal, including the letter or letters of claim in response to which the decision was issued; and (v) establish an expedited schedule for resolution of the appeal.

(b) Pleadings, discovery and other prehearing activity will be allowed only as consistent with the requirement to conduct the hearing on the date scheduled, or if no hearing is scheduled, to close the record on a date that will allow decisions within the 120–day limit. The Board, in its discretion, may impose shortened time periods for any actions prescribed or allowed under these rules, as necessary to enable the Board to decide the appeal within the 120–day limit, allowing whatever time, up to 30 days, that the Board considers necessary for the preparation of the decision after closing the record and the filing of briefs, if any.

(c) Written decision by the Board in cases processed under the Small Claims (Expedited) procedure will be short and contain only summary findings of fact and conclusions. Decisions will be rendered for the Board by a single Administrative Judge. If there has been a hearing, the Administrative Judge presiding at the hearing may, in the Judge's discretion, at the conclusion of the hearing and after entertaining such oral arguments as deemed appropriate, render on the record oral summary findings of fact, conclusions, and a decision of the Appeal. Whenever such an oral decision is rendered, the Board will subsequently furnish the parties a typed copy of such oral decision for record and payment purposes and to establish the starting date for the period for filing a motion for reconsideration under Rule 29.

(d) A decision against the Government or the contractor shall have no value as precedent, and in the absence of fraud shall be final and conclusive and may not be appealed or set aside.

12.3 *The Accelerated Procedure.* (a) Promptly upon receipt of an appellant's election of the accelerated procedure, the assigned Administrative Judge shall take the following actions, if feasible, in an informal meeting or a telephone conference with both parties: (i) identify and simplify the issues; (ii) establish a simplified procedure appropriate to the particular appeal involved; (iii) determine whether either party wants a hearing and if either does, fix a time and place therefor; (iv) require the Government to furnish all correspondence between the parties pertinent to the appeal, including the letter or letters of claim in response to which the decision was issued; and (v) establish an accelerated schedule for resolution of the appeal.

(b) Pleadings, discovery and other prehearing activity will be allowed only as consistent with the requirement to conduct the hearing on the dates scheduled, or if no hearing is scheduled, to close the record on a date that will allow decision within the 180-day limit. The Board, in its discretion, may impose shortened time periods for any actions prescribed or allowed under these rules, as necessary to enable the Board to decide the appeal within the 180-day limit, allowing whatever time, up to 30 days, that the Board considers necessary for the preparation of the decision after closing the record, and the filing of briefs, if any.

(c) Written decisions by the Board in cases processed under the accelerated procedure will normally be short and contain only summary findings of fact and conclusions. Decisions will be rendered for the Board by a single Administrative Judge with the concurrence of the Chair or a Vice Chair or other designated Administrative Judge, or by a majority among these two and an additional designated member in case of disagreement. Alternatively, in cases where the amount in dispute is $10,000 or less as to which the accelerated procedure has been elected and in which there has been a hearing, the single Administrative Judge presiding at the hearing may, with the concurrence of both parties, at the conclusion of the hearing and after entertaining such oral arguments as deemed appropriate, render on the record oral summary findings of fact, conclusions, and a decision of the appeal. Whenever such an oral decision is rendered, the Board will subsequently furnish the parties a typed copy of such oral decision for record and payment purposes, and to establish the starting date for the period for filing a motion for reconsideration under Rule 29.

12.4 *Motions for Reconsideration in Rule 12 cases.* Motions for Reconsideration of cases decided under either the small claims (expedited) procedure or the accelerated procedure need not be decided within the original 120-day or 180-day limit, but all such motions shall be processed and decided rapidly so as to fulfill the intent of this Rule.

13. *Settling the Record.* (a) The record upon which the Board's decision will be rendered consists of the documents furnished under Rules 4 and 12, to the extent admitted in evidence, and the following items, if any: pleadings, prehearing conference memoranda or orders, prehearing briefs, depositions or interrogatories received in evidence, admissions, stipulations, transcripts of conferences and hearings, hearing exhibits, posthearing briefs, and documents which the Board has specifically designated be made a part of the record. The record will, at all reasonable times, be available for inspection by the parties at the office of the Board.

(b) Except as the Board may otherwise order in its discretion, no proof shall be received in evidence after completion of an oral hearing or, in cases submitted on the record, after notification by the Board that the case is ready for decision.

(c) The weight to be attached to any evidence of record will rest within the sound discretion of the Board. The Board may in any case require either party, with appropriate notice to the other party, to submit additional evidence on any matter relevant to the appeal.

14. *Discovery—Depositions.* (a) General Policy and Protective Orders—The parties are encouraged to engage in voluntary discovery procedures. In connection with any deposition or other discovery procedure, the Board may make any order required to protect a party or person from annoyance, embarrassment, or undue burden or expense. Those orders may include limitations on the scope, method, time and place for discovery, and provisions for protecting the secrecy of confidential information or documents.

(b) When Depositions Permitted—After an appeal has been docketed and complaint filed, the parties may mutually agree to, or the Board may, upon application of either party, order the taking of testimony of any person by deposition upon oral examination or written interrogatories before any officer authorized to administer oaths at the place of examination, for use as evidence or for the purpose of discovery. The application for order shall specify whether the purpose of the deposition is discovery or for use as evidence.

(c) Orders on Depositions—The time, place, and manner of taking depositions shall be as mutually agreed by the parties, or failing such agreement, governed by order of the Board.

(d) Use as Evidence—No testimony taken by depositions shall be considered as part of the evidence in the hearing of an appeal until such testimony is offered and received in evidence at such hearing. It will not ordinarily be received in evidence if the deponent is present and can testify at the hearing. In such instances, however, the deposition may be used to contradict or impeach the testimony of the deponent given at the hearing. In cases submitted on the record, the Board may, in its discretion, receive depositions to supplement the record.

(e) Expenses—Each party shall bear its own expenses associated with the taking of any deposition.

(f) Subpoenas—Where appropriate, a party may request the issuance of a subpoena under the provisions of Rule 21.

15. *Interrogatories to Parties, Admission of Facts, and Production and Inspection of Documents.* After an appeal has been filed with the Board, a party may serve on the other party: (a) written interrogatories to be answered separately in writing, signed under oath and answered or objected to within 30 days; (b) a request for the admission of specified facts and/or the authenticity of any documents, to be answered or objected to within 30 days after service; the factual statements and the authenticity of the documents to be deemed admitted upon failure of a party to respond to the request; and (c) a request for the production, inspection and copying of any documents or objects not privileged, which reasonably may lead to the discovery of admissible evidence. Any discovery engaged in under this Rule shall be subject to the provisions of Rule 14(a) with respect to general policy and protective orders.

16. *Service of Papers Other than Subpoenas.* Papers shall be served personally or by mail, addressed to the party upon whom service is to be made. Copies of complaints,

answers and briefs shall be filed directly with the Board. The party filing any other paper with the Board shall send a copy thereof to the opposing party, noting on the paper filed with the Board that a copy has been so furnished. Subpoenas shall be served as provided in Rule 21.

Hearings

17. *Where and When Held.* Hearings will be held at such places determined by the Board to best serve the interests of the parties and the Board. Hearings will be scheduled at the discretion of the Board with due consideration to the regular order of appeals, Rule 12 requirements, and other pertinent factors. On request or motion by either party and for good cause, the Board may, in its discretion, adjust the date of a hearing.

18. *Notice of Hearings.* The parties shall be given at least 15 days notice of the time and place set for hearings. In scheduling hearings, the Board will consider the desires of the parties and the requirement for just and inexpensive determination of appeals without unnecessary delay. Notices of hearing shall be promptly acknowledged by the parties.

19. *Unexcused Absence of a Party.* The unexcused absence of a party at the time and place set for hearing will not be occasion for delay. In the event of such absence, the hearing will proceed and the case will be regarded as submitted by the absent party as provided in Rule 11.

20. *Hearings: Nature; Examination of Witnesses.* (a) Nature of Hearings—Hearings shall be as informal as may be reasonable and appropriate under the circumstances. Appellant and the Government may offer such evidence as they deem appropriate and as would be admissible under the Federal Rules of Evidence. Stipulations of fact agreed upon by the parties may be regarded and used as evidence at the hearing. The parties may stipulate the testimony that would be given by a witness if the witness were present. The Board may require evidence in addition to that offered by the parties.

(b) Examination of Witnesses—Witnesses before the Board will be examined orally under oath or affirmation, unless the presiding Administrative Judge or examiner shall otherwise order. If the testimony of a witness is not given under oath, the Board may advise the witness that his statements may be subject to the provisions of Title 18, United States Code, sections 287 and 1001, and any other provision of law imposing penalties for knowingly making false representations in connection with claims against the United States or in any matter within the jurisdiction of any department or agency thereof.

21. *Subpoenas.* (a) General—Upon written request of either party filed with the (clerk, recorder), or on his own initiative, the Administrative Judge to whom a case is assigned or who is otherwise designated by the Chairman may issue a subpoena requiring:

(i) testimony at a deposition—the deposing of a witness in the city or county where he resides or is employed or transacts his business in person, or at another location convenient for him that is specifically determined by the Board;

(ii) testimony at a hearing—the attendance of a witness for the purpose of taking testimony at a hearing; and

(iii) production of books and papers—in addition to (i) or (ii), the production by the witness at the deposition or hearing of books and papers designated in the subpoena.

(b) Voluntary Cooperation—Each party is expected (i) to cooperate and make available witnesses and evidence under its control as requested by the other party, without issuance of a subpoena, and (ii) to secure voluntary attendance of desired third-party witnesses and production of desired third-party books, papers, documents, or tangible things whenever possible.

(c) Requests for Subpoenas—

(1) A request for a subpoena shall normally be filed at least:

(i) 15 days before a scheduled deposition where the attendance of a witness at a deposition is sought;

(ii) 30 days before a scheduled hearing where the attendance of a witness at a hearing is sought.

In its discretion the Board may honor requests for subpoenas not made within these time limitationss.

(2) A request for a subpoena shall state the reasonable scope and general relevance to the case of the testimony and of any books and papers sought.

(d) Requests to Quash or Modify—Upon written request by the person subpoenaed or by a party, made within 10 days after service but in any event not later than the time specified in the subpoena for compliance, the Board may (i) quash or modify the subpoena if it is unreasonable and oppressive or for other good cause shown, or (ii) require the person in whose behalf the subpoena was issued to advance the reasonable cost of producing subpoenaed books and papers. Where circumstances require, the Board may act upon such a request at any time after a copy has been served upon the opposing party.

(e) Form; Issuance—

(1) Every subpoena shall state the name of the Board and the title of the appeal, and shall commmand each person to whom it is directed to attend and give testimony, and if appropriate, to produce specified books and papers at a time and place therein specified. In issuing a subpoena to a requesting party, the Administrative Judge shall sign the subpoena and may, in his discretion, enter the name of the witness and otherwise leave it blank. The party to whom the subpoena is issued shall complete the subpoena before service.

(2) Where the witness is located in a foreign country, a letter rogatory or subpoena may be issued and served under the circumstances and in the manner provided in 28 U.S.C. 1781-1784.

(f) Service—

(1) The party requesting issuance of a supoena shall arrange for service.

(2) A subpoena requiring the attendance of a witness at a deposition or hearing may be served at any place. A subpoena may be served by a United States marshal or deputy marshal, or by any other person who is not a party and not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by personally delivering a copy to that person and tendering the fees for one day's attendance and the mileage provided by 28 U.S.C. 1821 or other applicable law.

(3) The party at whose instance a subpoena is issued shall be responsible for the payment of fees and mileage of the witness and of the officer who serves the subpoena. The failure to make payment of such charges on demand may be deemed by the Board as a sufficient ground for striking the testimony of the witness and the evidence the witness has produced.

(g) Contumacy or Refusal to Obey a Subpoena—In case of contumacy or refusal to obey a subpoena by a person who resides, is found, or transacts business within the jurisdiction of a United States District Court, the Board will apply to the Court through the Attorney General of the United States for an order requiring the person to appear before the Board or a member thereof to give testimony or produce evidence or both. Any failure of any such person to obey the order of the Court may be punished by the Court as a contempt thereof.

22. *Copies of Papers.* When books, records, papers, or documents have been received in evidence, a true copy thereof or of such part thereof as may be material or relevant may be substituted therefor, during the hearing or at the conclusion thereof.

23. *Posthearing Briefs.* Posthearing Briefs may be submitted upon such terms as may be agreed upon by the parties and the presiding Administrative Judge or examiner at the conclusion of the hearing.

24. *Transcript of Proceedings.* Testimony and argument at hearings shall be reported verbatim, unless the Board otherwise orders. Waiver of transcript may be especially suitable for hearings under Rule 12.2. Transcripts or copies of the proceedings shall be supplied to the parties at the actual cost of duplication.

25. *Withdrawal of Exhibits.* After a decision has become final the Board may, upon request and after notice to the other party, in its discretion permit the withdrawal of original exhibits, or any part thereof, by the party entitled thereto. The substitution of true copies of exhibits or any part thereof may be required by the Board in its discretion as a condition of granting permission for such withdrawal.

Representation

26. *The Appellant.* An individual appellant may appear before the Board in person, a corporation by one of its officers; and a partnership or joint venture by one of its members; or any of these by an attorney at law duly licensed in any state, commonwealth, territory, the District of Columbia, or in a foreign country. An attorney representing an appellant shall file a written notice of appearance with the Board.

27. *The Government.* Government counsel may, in accordance with their authority, represent the interest of the Government before the Board. They shall file notices of appearance with the Board, and notice thereof will be given appellant or appellant's attorney in the form specified by the Board from time to time. Whenever appellant and the Government counsel are in agreement as to disposition of the controversy, the Board may suspend further processing of the appeal. However, if the Board is advised thereafter by either party that the controversy has not been disposed of by agreement, the case shall be restored to the Board's calendar without loss of position.

Decisions

28. *Decisions.* Decisions of the Board will be made in writing and authenticated copies

of the decision will be forwarded simultaneously to both parties. The rules of the Board and all final orders and decisions shall be open for public inspection at the offices of the Board in Washington, D.C. Decisions of the Board will be made solely upon the record, as described in Rule 13.

Motion for Reconsideration

29. *Motion for Reconsideration.* A motion for reconsideration, may be filed by either party. It shall set forth specifically the grounds relied upon to sustain the motion. The motion shall be filed within 30 days from the date of the receipt of a copy of the decision of the Board by the party filing the motion.

Dismissals and Defaults

30. *Dismissal Without Prejudice.* In certain cases, appeals docketed before the Board are required to be placed in a suspense status and the Board is unable to proceed with disposition thereof for reasons not within the control of the Board. Where the suspension has continued, or may continue, for an inordinate length of time, the Board may, in its discretion, dismiss such appeals from its docket without prejudice to their restoration when the cause of suspension has been removed. Unless either party or the Board acts within three years to reinstate any appeal dismissed without prejudice, the dismissal shall be deemed with prejudice.

31. *Dismissal or Default for Failure to Prosecute or Defend.* Whenever a record discloses the failure of either party to file documents required by these rules, respond to notices or correspondence from the Board, comply with orders of the Board, or otherwise indicates an intention not to continue the prosecution or defense of an appeal, the Board may issue an order requiring the offending party to show cause why the appeal should not be either dismissed or granted, as appropriate. If no cause is shown, the Board may take appropriate action.

32. *Remand from Court.* Whenever any court remands a case to the Board for further proceedings, each of the parties shall, within 20 days of such remand, submit a report to the Board recommending procedures to be followed so as to comply with the court's order. The Board shall consider the reports and enter special orders governing the handling of the remanded case. To the extent the court's directive and time limitations permit, such orders shall conform to these rules.

Sanctions

33. If any party fails or refuses to obey an order issued by the Board, the Board may then make such order as it considers necessary to the just and expeditious conduct of the appeal.

Effective Date

34. These rules shall apply (1) mandatorily, to all appeals relating to contracts entered into on or after March 1, 1979, and (2) at the contractor's election, to appeals relating to earlier contracts, with respect to claims pending before the contracting officer on March 1, 1979 or initiated thereafter.

REGULATORY COVERAGE AND CONTRACT CLAUSE

I. *Regulatory Coverage—Disputed Procedure.* Section 1-314 of the Defense Acquisition Regulation (DAR) and Section 1-1.318 of the Federal Procurement regulations (FPR) are amended to provide as follows:

1. *Contract Disputes Act of 1978.* (a) *General*—The Contract Disputes Act of 1978 (P.L. 95-563, 41 U.S.C. 601-613) establishes procedures and remedies to resolve disputes under Government contracts. It is the Government's policy, consistent with that Act, to try to resolve all disputes by mutual agreement at the Contracting Officer's level, without litigation. In appropriate circumstances, before issuance of a Contracting Officer's decision, informal discussions between the parties, to the extent feasible by individuals who have not participated substantially in the matter in dispute, can aid in the resolution of differences by mutual agreement and should be considered, The Contracting Officer is authorized (within any specific limitations in his warrant) to settle all disputes relating to a contract containing the Disputes clause in (DAR 7-103.12)(FPR 1-7.102-12).

(b) *Exceptions to Use of Disputes Clause.* The Disputes clause is prescribed for use in all contracts covered by this regulation, except contracts with a foreign government or agency thereof, or with an international organization or subsidiary body thereof, if the head of the agency determines that application of the Contract Disputes Act to the contract would not be in the public interest.

(c) *Exceptions to Applicability of Disputes Clause Procedures.* Under contracts containing the Disputes clause, the procedures and remedies in the clause and this paragraph do not apply to: (1) any claim or dispute for penalties or forfeitures prescribed by statute or regulation which another Federal agency is specifically authorized to administer, settle, or determine, or (ii) any claim involving fraud.

(d) *Public Law 85-804 Requests*. Requests for relief under Public Law 85-804 are not considered to be claims within the Contract Dispute Act of 1978 or the Disputes clause, and shall continue to be processed under (DAR Section XVII) (FPR Part 1-17). However, certain kinds of relief formerly available within the agency only under Public Law 85-804 and not within the Contracting Officer's authority, such as alleged legal entitlement to rescission or reformation for mutual mistake, are now within the Contracting Officer's authority under the Act and the Disputes clause. In case of doubt, the contracting officer should obtain legal advice as to authority to settle or decide specific types of claims.

2. *Contractor Certification of Claims Over $50,000*. Any contractor claim over $50,000 (either initially or as amended) must be certified in accordance with paragraph (c) of the Disputes clause before settlement or decision on the claim.

3. *Contracting Officer's Decision*. (a) When a claim cannot be satisfied or settled by agreement and a decision on the claim is necessary, the Contracting Officer shall:

(i) Review the facts pertinent to the claim;

(ii) Secure assistance from legal and other advisors; and

(iii) Coordinate with the contract administration office or contracting office, when appropriate.

(b) The Contracting Officer shall furnish a copy of the decision to the contractor, by certified mail, return receipt requested, or any other method that provides evidence of receipt, and include in the decision:

(i) A paragraph substantially as follows: This is the final decision of the Contracting Officer. This decision may be appealed to the cognizant Board of Contract Appeals. If you decide to make such an appeal you must mail or otherwise furnish written notice thereof to the Board of Contract Appeals, within ninety days from the date you receive this decision. A copy thereof shall be furnished to the Contracting Officer from whose decision the appeal is taken. The notice shall indicate that an appeal is intended, should reference this decision, and identify the contract by number. In lieu of appealing to the cognizant Board of Contract Appeals you may bring an action directly in the U.S. Court of Claims, within twelve months of the date you receive this decision.

(ii) A description of the claim or dispute;

(iii) A reference to pertinent contract provisions;

(iv) A statement of the factual areas of agreement or disgreement;

(v) A statement of the Contracting Officer's decision, with supporting rationale;

(vi) Notification that the small claims procedure of the cognizant Board shall be applicable at the sole election of the contractor in the event the amount in dispute as a result of the final decision is $10,000 or less; and

(vii) Notification that the accelerated procedure of the cognizant Board shall be applicable at the sole election of the contractor in the event the amount in dispute as a result of the final decision is $50,000 or less.

(c) The Contracting Officer shall issue the decision within the following statutory time limitations:

(i) For claims not exceeding $50,000: Sixty days after receipt of the claim.

(ii) For submitted claims exceeding $50,000: Sixty days after receipt of claim: provided, however, if a decision is not issued within sixty days the Contracting Officer shall notify the contractor of the time within which he will make the decision. The reasonableness of this time period will depend on the size and complexity of the claim and the adequacy of the contractor's supporting data and any other relevant factors.

(d) The amount determined payable pursuant to the decision, less any portion already paid, normally should be paid without awaiting contractor action concerning appeal. Such payment shall be without prejudice to the rights of either party.

4. *Government Claims Against the Contractor*. All claims asserted by the Government against a contractor relating to a contract which cannot be settled by agreement shall be the subject of a decision by the Contracting Officer.

5. *Payment of Interest on Contractor's Claims*. The Government shall pay interest on contractors' claims as prescribed in paragraph (d) of the Disputes clause.

II. *Disputes Clause*.

1. Sections 7-103.12 and 7-602.6 of the Defense Acquisition Regulation and Sections 1-7.102-12 and 1-7.602.6 of the Federal Procurement Regulations are amended to provide as follows:

The Contracting Officer shall insert the following clause in all contracts unless exempted by the head of the agency under 41 U.S.C. 603(c):

Disputes. (a) This contract is subject to the Contract Disputes Act of 1978 (41 U.S.C. 601, *et seq.*). If a dispute arises relating to the contract, the contractor may submit a claim to the Contracting Officer who shall issue a written decision on the dispute in the manner specified in DAR 1-314 (FPR 1-1.318).

(b) "Claim" means:

(1) a written request submitted to the Contracting Officer;

(2) for payment of money, adjustment of contract terms, or other relief;

(3) which is in dispute or remains unresolved after a reasonable time for its review and disposition by the Government; and

(4) for which a Contracting Officer's decision is demanded.

(c) In the case of disputed requests or amendments to such requests for payment exceding $50,000, or with any amendment causing the total request in dispute to exceed $50,000, the Contractor shall certify, at the time of submission as a claim, as follows:

I certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of my knowledge and belief; and that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable.

(Contractor's Name) ————————

(Title) ————————————

(d) The Government shall pay the contractor interest:

(1) on the amount found due on claims submitted under this clause;

(2) at the rates fixed by the Secretary of the Treasury, under the Renegotiation Act, Public Law 92-41;

(3) from the date the Contractiong Officer receives the claim, until the Government makes payment.

(e) The decision of the Contracting Officer shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency unless an appeal or action is timely commenced within the times specified by the Contract Disputes Act of 1978.

(f) The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal or action related to the contract, and comply with any decision of the Contracting Officer.

(End of Clause)

III. *Regulatory Coverage—Section 5 of the Public Law 95-563.*

The Federal Procurement Regulations are amended by adding the following new section 1-1.328:

1-1.328 Fraudulent Claims. (a) Section 5 of the Contract Disputes Act of 1978 (41 U.S.C. 601, 604) provides that if a contractor is unable to support any part of its claim under the contract and such inability is attributable to misrepresentation of fact or fraud on the part of the contractor, it shall be liable to the Government for—

(i) an amount equal to the unsupported part of the claim; and

(ii) costs to the Government attributable to reviewing that part of the claim.

(b) "Misrepresentation of fact" is defined by the Contract Disputes Act as a false statement of substantive fact, or any conduct which leads to a belief of a substantive fact material to proper understanding of the matter in hand, made with intent to deceive or mislead.

(c) All instances of suspected fraudulent claims shall be reported, through channels, to the Attorney General.

The Defense Acquisition Regulation is amended by adding the following section 1-111.5:

1-111.5 Fraudulent Claims. (a) Section 5 of the Contract Disputes Act of 1978 (41 U.S.C. 601, 604) provides that if a contractor is unable to support any part of its claim under the contract and such inability is attributable to misrepresentation of fact or fraud on the part of the contractor, it shall be liable to the Government for—

(1) an amount equal to the unsupported part of the claim, and

(2) costs to the Government attributable to reviewing that part of the claim.

(b) "Misrepresentation of fact" is defined by the Contract Disputes Act as a false statement of substantive fact, or any conduct which leads to a belief of a substantive fact material to proper understanding of the matter in hand, made with intent to deceive or mislead.

(c) As indicated in 1-111.1 all instances of suspected fraudulent claims shall be reported in accordance with procedures set forth in Part 6 of this section.

[FR. Doc. 79-6929 Filed 3-6-79; 8:45 am]

CONTRACT DISPUTES: ADOPTION OF FINAL UNIFORM RULES OF PROCEDURE AND RELATED PROCUREMENT REGULATIONS

Office of Federal Procurement Policy

44 Fed. Reg. 34228 (June 14, 1979)

OFFICE OF MANAGEMENT AND BUDGET

Office of Federal Procurement Policy

Final Uniform Rules of Procedure for Boards of Contract Appeals Under the Contract Disputes Act of 1978

May 31, 1979.

AGENCY: Office of Federal Procurement Policy (OFPP), Office of Management and Budget.

ACTION: Notice of Final Uniform Rules of Procedure issued as guidelines for adoption by Boards of Contract Appeals.

SUMMARY: On November 1, 1978, the President signed into law Pub. L. 95–563, the Contracts Disputes Act of 1978. That Act, among other things, required the Office of Federal Procurement Policy to issue guidelines for the procedures of the agency Boards of Contract Appeals by March 1, 1979.

To achieve maximum uniformity for Government contract appeal practice, agency Boards of Contract Appeals are expected to adopt the Uniform Rules of Procedure except where minor variances are justified due to the individual Board's size or nature of its docket.

Proposed Uniform Rules of Procedure were published for comment in the January 25, 1979, **Federal Register.** Interim final Uniform Rules of Procedure, effective March 1, 1979, were published in the **Federal Register** of March 7, 1979, for additional comment. The additional comment period was considered necessary because of the significance of some of the changes made to then existing Rules. The interim final Rules were to become effective on June 1, 1979, unless changed.

This is to provide notice that the Uniform Rules of Procedure published March 7, 1979, together with the changes provided below, are now final guidelines for adoption by agency Boards of Contract Appeals.

Changes to Final Uniform Rules of Procedure

Rule 4 is changed to read as follows:

4. *Preparation, Content, Organization, Forwarding, and Status of Appeal File.* (a) Duties of Contracting Officer—Within 30 days of receipt of an appeal, or notice that an appeal has been filed, the contracting officer shall assemble and transmit to the Board (through the) an appeal file consisting of all documents pertinent to the appeal, including:

(1) The decision from which the appeal is taken;

(2) The contract including specifications and pertinent amendments, plans, and drawings;

(3) All correspondence between the parties relevant to the appeal, including the letter or letters of claim in response to which the decision was issued;

(4) Transcripts of any testimony taken during the course of proceedings, and affidavits or statements of any witnesses on the matter in dispute made prior to the filing of the notice of appeal with the Board; and

(5) Any additional information considered relevant to the appeal.

Within the same time above specified the ( ) shall furnish the appellant a copy of each document he transmits to the Board, except those in subparagraph (a)(2) above. As to the latter, a list furnished appellant indicating specific contractual documents transmitted will suffice.

(b) Duties of the Appellant—Within 30 days after receipt of a copy of the appeal file assembled by the contracting officer, the appellant shall transmit to the Board any documents not contained therein which he considers relevant to the appeal, and furnish two copies of such documents to the government trial attorney.

(c) Organization of Appeal File—Documents in the appeal file may be originals or legible facsimiles or authenticated copies, and shall be arranged in chronological order where practicable, numbered sequentially, tabbed, and indexed to identify the contents of the file.

(d) Lengthy Documents—Upon request by either party, the Board may waive the requirement to furnish to the other party copies of bulky, lengthy, or out-of-size documents in the appeal file when inclusion would be burdensome. At the time a party files with the Board a document as to which such a waiver has been granted he shall notify the other party that the document or a copy is available for inspection at the offices of the Board or of the party filing same.

(e) Status of Documents in Appeal File—Documents contained in the appeal file are considered, without further action by the parties, as part of the record upon which the Board will render its decision. However, a party may object, for reasons stated, to consideration of a particular document or documents reasonably in advance of hearing or, if there is no hearing, of settling the record. If such objection is made the Board shall remove the document or documents from the appeal file and permit the party offering the document to move its admission as evidence in accordance with Rules 13 and 20.

(f) Notwithstanding the foregoing the filing of the Rule 4 (a) and (b) documents may be dispensed with by the Board either upon request of the appellant in his notice of appeal or thereafter upon stipulation of the parties.

In Rule 12.1(c) change "20 days" to "60 days."

Change Rule 12.2(a) to read as follows:

"12.2(a) In cases proceeding under the SMALL CLAIMS (EXPEDITED) procedure, the following time periods shall apply: (1) Within ten days from the Government's first receipt from either the appellant or the Board of a copy of the appellant's notice of election of the SMALL CLAIMS (EXPEDITED) procedure, the Government shall send the Board a copy of the contract, the contracting officer's final decision, and the appellant's claim letter or letters, if any; remaining documents required under Rule 4 shall be submitted in accordance with times specified in that rule unless the Board otherwise directs;

(2) Within 15 days after the Board has acknowledged receipt of appellant's notice of election, the assigned administrative judge shall take the following actions, if feasible, in an informal meeting or a telephone conference with both parties: (i) Identify and simplify the issues; (ii) establish a simplified procedure appropriate to the particular appeal involved; (iii) determine whether the appellant wants a hearing, and if so, fix a time and place therefor; (iv) require the Government to furnish all the additional documents relevant to the appeal, and (v) establish an expedited schedule for resolution of the appeal."

Change Rule 12.3(a) to read as follows:

"12.3(a) In cases proceeding under the ACCELERATED procedure, the parties are encouraged, to the extent possible consistent with adequate presentation of their factual and legal positions, to waive pleadings, discovery, and briefs. The Board, in its discretion, may shorten time periods prescribed elsewhere in these Rules, including Rule 4, as necessary to enable the Board to decide the appeal within 180 days after the Board has received the appellant's notice of election of the ACCELERATED procedure, and may reserve 30 days for preparation of the decision."

Change the first phrase of the first

sentence of Rule 15 to read as follows:

"After an appeal has been docketed and complaint filed with the Board . . ."

Change the last sentence of Rule 15 to read as follows:

"Any discovery engaged in under this Rule shall be subject to the provisions of Rule 14(a) with respect to general policy and protective orders, and of Rule 33 with respect to sanctions."

Change Rule 21(f)(2) to read as follows:

A subpoena requiring the attendance of a witness at a deposition or hearing may be served at any place. A subpoena may be served by a United States marshal or deputy marshal, or by any other person who is not a party and not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by personally delivering a copy to that person and tendering the fees for one day's attendance and the mileage provided by 28 U.S.C. 1821 or other applicable law; however, where the subpoena is issued on behalf of the Government, money payments need not be tendered in advance of attendance.

Insert the following in the second sentence of Rule 28 after the word "decision":

"(except those required for good cause to be held confidential and not cited as precedents)"

Change Rule 31 to read as follows:

"Whenever a record discloses the failure of either party to file documents required by these rules, respond to notices or correspondence from the Board, comply with orders of the Board, or otherwise indicates an intention not to continue the prosecution or defense of an appeal, the Board may, in the case of a default by the appellant, issue an order to show cause why the appeal should not be dismissed or, in the case of a default by the Government, issue an order to show cause why the Board should not act thereon pursuant to Rule 33. If good cause is not shown, the Board may take appropriate action."

Contract Disputes; Final Uniform Rules of Procedure and Related Procurement Regulations; Final Approval of Text To Be Adopted: Proposed Text of Contract Disputes Clause

May 29, 1979.

AGENCY: Office of Federal Procurement Policy, Office of Management and Budget.

ACTION: Final text of uniform rules of procedure and related procurement regulations to be adopted; comments requested on text of contract disputes clause.

SUMMARY: On November 1, 1978, the President signed into law Public Law 95–563, the Contract Disputes Act of 1978. That Act, among other things, required certain changes to clauses and procurement regulations of the procuring agencies by March 1, 1979. To assure uniformity of language in the resulting changes, a suggested text of provisions to implement that Act was published at 44 FR 5219, January 25, 1979 for comment. After consideration of comments received and resulting changes to the suggested text, a set of interim final rules was published March 7, 1979. This set of interim final rules contains language to be used by the affected agencies when amending their regulations. This language was to become final June 1, 1979, unless changed before that time. This document gives notice that the interim final rule language is effective June 1, 1979, with the exception of the contract disputes clause which remains an interim clause. Comment is now invited on the new disputes clause set forth below.

DATES: Effective date of text which agencies are directed to adopt is June 1 1979. Comments on the proposed disputes clause should be received on or before August 1, 1979.

ADDRESS: Comments are to be submitted to the Office of Federal Procurement Policy, OMB, 726 Jackson Place, N.W., Room 9025, Washington, D.C. 20503.

FOR FURTHER INFORMATION CONTACT: Mr. Thomas F. Williamson, Associate Administrator for Acquisition Law, (202) 395–3455.

James D. Currie,
Acting Administrator.

SUPPLEMENTARY INFORMATION: On November 1, 1978, the President signed into law Public Law 95–563, the Contract Disputes Act of 1978. That Act, among other things, required changes to clauses and procurement regulations of the procuring agencies by March 1, 1979. To assure uniformity of language in the resulting changes, a suggested text of proposed regulations and clause to be adopted by the affected agencies was published for comment January 25, 1979 (44 FR 5219). Suggested language of interim final regulations and clause, effective March 1, 1979, was published (for additional comments) March 7, 1979 (44 FR 12519). The language of the interim final regulations which the agencies are directed to adopt was to become final June 1, 1979, unless changed before that time. The language incorporated the changes required by Public Law 95–563 and reflect many of the comments received on the proposed text published January 25, 1979 (44 FR 5219).

This document provides notice that approval of the language which the agencies are directed to use in amending their regulations is effective as of June 1, 1979 except for the disputes clause which remains an interim clause.

Comment is now invited on a new Disputes Clause set forth below. The purposes of the changes reflected in the new Disputes Clause are to: (1) more clearly reflect the intent of the Contract Disputes Act with regard to the Payment of Interest, (2) change the time for certification of a claim exceeding $50,000, and (3) change the extent of a contractor's obligation to continue work pending resolution of a dispute arising in connection with a contract. The intent of the Disputes clause proposed here is to give the contractor the right to stop work under some circumstances pending resolution of a contract dispute.

It is proposed that the following text be used by the affected agencies in amending the Defense Acquisition Regulation and the Federal Procurement Regulations (32 CFR 7–103–12 and 41 CFR 1–7.102–12):

Proposed Disputes Clause

1. Section 7–103–12 of the Defense Acquisition Regulation and Section 1–7.102–12 of the Federal Procurement Regulations are amended to provide as follows:

The contracting officer shall insert the following clause in all contracts unless exempted by the head of the agency under 41 U.S.C. 603(c):

Disputes

(a) Failure of the parties after a reasonable time to reach an agreement on a request for the payment of money or adjustment of contract terms shall constitute a dispute that is subject to the Contract Disputes Act of 1978 (41 U.S.C. 601, *et. seq.).* If a dispute arises relating to the contract, the contractor shall submit a claim in writing to the contracting Officer who shall issue a written decision on the dispute in the manner specified in DAR 1–314 (FPR 1–1318).

(b) In the case of claims for payment exceeding $50,000, or with any amendment causing the total request in dispute to exceed $50,000, the contractor shall certify, before settlement or decision of the contracting officer on the claim, as follows:

I certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of my knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable.

(Contractor's Name)

____

(Title) ____________________________

(c) The Government shall pay the contractor interest

(1) On the amount found due and unpaid on claims submitted under this clause;

(2) At the rates fixed by the Secretary of the Treasury, under the Renegotiation Act, Public Law 92–41;

(3) From the date the contracting officer receives the claim, until the Government makes payment.

(d) The decision of the Contracting Officer shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency unless an appeal or action is timely commenced within the times specified by the Contract Disputes Act of 1978.

(e) The contractor shall comply with any decision of the contracting officer and proceed diligently with performace of this contract pending final resolution of any request for relief, claim, appeal, or action related to this contract, except where there has been a material breach of the contract by the Government; *provided*, however, that in any event the contractor shall proceed diligently with the performance of the contract where the head of the agency has made a written determination that continuation of work under the contract is essential to the National Defense or the Public Health and Safety.

[End of Clause]

[FR Doc. 79–18532 Filed 6–13–79, 8:45 am]

BILLING CODE 3110–01–M

REGULATORY GUIDANCE ON PUB. L. 95–563, THE CONTRACT DISPUTES ACT OF 1978

Office of Federal Procurement Policy
OFPP Policy Letter 80–3

45 Fed. Reg. 31035 (May 9, 1980)

Final Contract Disputes Regulatory Coverage and Contract Disputes Clause

AGENCY: Office of Federal Procurement Policy, Office of Management and Budget.

ACTION: Policy directive.

SUMMARY: This policy directive sets forth amendments to be made to the Federal Procurement Regulations (FPR), the Defense Acquisition Regulations (DAR), and the National Aeronautics and Space Administration Procurement Regulations (NASAPR) relating to contract disputes regulatory coverage and the contract dispute clause.

On November 1, 1978, the President signed into law Pub. L. 95–563, the Contract Disputes Act of 1978. That Act, among other things, required certain changes to clauses and procurement regulations of the procuring agencies by March 1, 1979. To assure uniformity of language in the resulting changes, a suggested text of provisions to implement that Act was published at 44 FR 5219, January 25, 1979 for comment. After consideration of comments received and resulting changes to the suggested text, a set of interim final regulations and a Contract Disputes Clause was published at 44 FR 12519, March 7, 1979. This set of interim final regulations and Disputes clause contained language to be used by the affected agencies when amending their regulations. This language was to become final June 1, 1979, unless changed before that time.

The interim final rules were made final by notice published at 44 FR 34228, June 14, 1979, but the Disputes clause remained as interim. In addition, a second proposed Disputes clause was published there for comment.

Comments have been received and evaluated and this document (1) rescinds the regulations and contract Disputes clause issued March 7 and June 14, 1979, and (2) provides final regulatory coverage and a contract Disputes clause for incorporation into the Defense Acquisition Regulation, the Federal Procurement Regulations, and the National Aeronautics and Space Administration Procurement Regulations.

A major change from the regulations and interim Disputes clause, in use since March 1979, concerns the extent of the contractor's obligation to continue performance of work. Prior to the passage of the Contract Disputes Act, a contractor, pursuant to the Disputes clause then in effect, was in the event of a dispute arising under the contract, obligated to continue performance in accordance with the contracting officer's decision pending resolution of the dispute. On the other hand, if the dispute arose out of the contract, or in breach of the contract, there was no obligation to continue work. The interim Disputes clause expanded the contractor's obligation to continue performance to include disputes arising out of, or in breach of, the contract as well as under the contract. The final Disputes clause published here returns the situation to the pre-Contract Disputes Act obligation. Under the Disputes clause and the accompanying regulations, the contractor is obligated to continue performance only if the dispute arises under the contract. It is recognized, however, that in unusual circumstances the performance of some contracts may be vital to the national security or to the public health and welfare so that performance must be guaranteed even in the event of a dispute arising out of, or in breach of, contract. In those unusual cases, procuring agencies may provide for a change to the Disputes clause to assure a continuation of the work. In such cases agencies should also seek to provide appropriate financing to cover the additional work, provided that the Government's interests are properly secured.

The final Disputes clause and regulations also provide technical changes from the interim clause and regulations with regard to payment of interest, procedures for certification of a claim exceeding $50,000, and other areas. These changes are made to better reflect the intent of the Contract Disputes Act.

DATES: This regulatory coverage and contract Disputes clause are to be effective June 1, 1980, and shall apply to all solicitations and resulting contracts issued on or after June 1, 1980.

FOR FURTHER INFORMATION CONTACT: Ms. Patricia A. Szervo, Associate Administrator for Acquisition Law, (202) 395–3501.

Dated: April 30, 1980.

Karen Hastie Williams,
Administrator.

OFPP Policy Letter 80–3

To the Heads of Executive Departments and Establishments

Subject: Regulatory Guidance on Pub. L. 95–563, th contract Disputes Act of 1978

There is a need in Government for uniformity and consistency in the application of procurement policy. This directive provides the uniform policy applicable to the Contract Disputes Act of 1978. The clauses and regulatory coverage that follow articulate this uniform policy. The Defense Acquisition Regulation (ADR), the Federal Procurement Regulations (FPR), and the National Aeronautics and Space Administration Procurement Regulations (NASA PR) shall be amended to conform to this policy. This guidance supersedes in its entirety the guidelines previously published in the Federal Register, on March 7, 1979 (44 FR 12519), and June 14, 1979 (44 FR 24228).

I. Regulatory Coverage—Resolution of Claims

1. *Contract Disputes Act of 1978:*

(a) General. The Contract Disputes Act of 1978 (Pub. L. 95–563, 41 U.S.C. 601–613) establishes procedures and requirements for asserting and resolving claims by or against contactors relating to a contract subject to the Act. In addition, the Act provides for the payment of interest on contractor claims, for the certification of contract claims in excess of $50,000, and a civil penalty for contractor claims that are fraudelent or based on a misrepresentation of fact.

(b) Definition of Claim:

(i) As used herein"claim" means a written demand by one of the contracting parties seeking, as a legal right, the payment of money, adjustment or interpretation of contract terms, or other relief, arising under or related to the contract.

(ii) A voucher, invoice, or request for payment that is not in dispute when submitted is not a claim for the purposes of the Act. However, where such submission is subsequently not acted upon in a reasonable time, or disputed either as to liability or amount, it may be converted to a claim under Section 6(a) of the Act as provided in Section 3, below.

(c) Government Policy on Settlement by Mutual Agreement. It is the Government's policy, consistent with the Act, to try to resolve all claims by mutual agreement at the contracting officer's level, without litigation. Implementation of this policy depends on an open mind with regard to the matter in dispute and the adequacy of the information provided in support of the claim by both the contractor and the Government. In appropriate circumstances, before issuance of a contracting officer's decision on a claim, informal discussions between the parties, to the extent feasible, by individuals who have not participated substantially in the matter in dispute, can aid in the resolution of differences by mutual agreement and should be considered.

(d) Contracting Officer Authority. Except as provided in this subsection (d), the contracting Officer is authorized (within any specific limitation in his warrant) to decide or settle all claims relating to a contract subject to the Act. The authority of this subsection (d) does not extend to (1) a claim or dispute for penalties or forfeitures prescribed by statute or regulation which another Federal agency is specifically authorized to administer, settle, or determine, or (2) any claim involving fraud. See Section 2, below.

(e) Contracts Excepted from the Act. A contract with a foreign government or agency thereof, or with an international organization or subsidiary body thereof may be exempted for the Act and DAR Section 1–314 and FPR Section 1–1.318, if the head of the Agency determines that application of the Contract Disputes Act to the contract would not be in the public interest.

(f) Pub. L. 85–804 Requests. Requests for relief under Pub. L. 85–804 are not considered to be claims within the Contract disputes Act of 1978 or the Disputes clause, and shall continue to be processed under DAR Section XVII or FPR Section 1–17.

2. *Referreal of Suspected Fraudulent Claims*—If a contractor is unable to support any part of its claim and there is evidence that such inability is attributable to misrepresentation of fact or fraud on the part of the contractor, the contracting officer shall refer the matter to the designated Agency official responsible for investigating fraud.

3. *Initiation of a Claim*—Except as provided in the Act, (a) contractor claims shall be made in writing and submitted to the contracting officer for a decision, and (b) claims by the Government against a contractor shall be the subject of a contracting officer decision.

4. *Contracting Officer's Decision:*

(a) When a claim by or against a contractor cannot be satisfied or settled by agreement and a decision on the claim is necessary, the Contracting Officer shall:

(i) Review the facts pertinent to the claim;

(ii) Secure assistance from legal and other advisors; and

(iii) Coordinate with the contract administration office or Contracting Office, when appropriate.

(b) The Contracting Officer shall furnish a copy of the decision to the contractor, by certified mail, return receipt requested, or by any other method that provides evidence of receipt, and shall include in the decision:

(i) A paragraph substantially as follows:

This is the final decision of the Contracting Officer. This decision may be appealed to the Board of Contract Appeals.

If you decide to make such an appeal, you must mail or otherwise furnish written notice thereof to the Board of Contract Appeals within ninety days from the date you receive this decision. A copy thereof shall be furnished to the Contracting Officer from whose decision the appeal is taken. The notice shall indicate that an appeal is intended, shall reference this decision, and identify the contract by number. In lieu of appealing to the cognizant Board of Contract Appeals you may bring an action directly in the U.S. Court of Claims,[4] within twelve months of the date you receive this decision.

(ii) A description of the claim or dispute;

(iii) A reference to pertinent contract provisions;

(iv) A statement of the factual areas of agreement or disagreement;

(v) A statement of the Contracting Officer's decision, with supporting rationale;

(vi) Notification that the small claims procedure of the cognizant Board shall be applicable at the sole election of the contractor in the event that the amount in dispute as a result of the final decision is $10,000 or less; and

(vii) Notification that the accelerated procedure of the cognizant Board shall be applicable, at the sole election of the contractor in the event the amount in dispute as a result of the final decision is $50,000 or less.

(c) The Contracting Officer shall issue the decision within the following statutory time limitation:

(i) For claims not exceeding $50,000: Sixty days after receipt of the claim.

(ii) For claims exceeding $50,000: Sixty days after receipt of claim; provided, however, if a decision is not issued within sixty days the Contracting Officer shall notify the contractor of the time within which he will make the decision. The reasonableness of this time period will depend on the size and complexity of the claims and the adequacy of the contractor's supporting data and any other relevant factors.

(d) The amount determined payable pursuant to the decision, less any portion already paid, should be paid, if otherwise proper, without awaiting contractor action concerning appeal. Such payment shall be without prejudice to the rights of either party.

5. *Payment of Interest on Contractor's Claims*—The Government shall pay interest on a contractor claim on the amount found due and unpaid, from the date the Contracting Officer receives the claim until the date payment is made, at the rates fixed by the Secretary of the Treasury pursuant to the Renegotiation Act, Pub. L. 92–41.

6. *Disputes Clause:*

(a) The Act applies to all disputes with respect to contracting officer decisions on matters arising out of or relating to a contract. Agency Boards of Contract Appeals (BCA) created under the Act have the same jurisdiction as the Court of Claims with respect to a claim that is subject to the Act. Thus, the statutory agency BCAs continue to have all of the authority they possessed before the Act with respect to disputes arising under a contract, as well as authority to decide disputes relating to a contract. The Disputes clause set forth in Part II recognizes the all disputes authority established by the Act, and states certain requirements and limitations of the Act for the guidance of contractors and contracting agencies. It is not intended to affect the rights and obligations of the parties as provided by the Act, nor to constrain the authority of the statutory agency BCAs in the handling and deciding of contractor appeals pursuant to the Act.

(b) Obligation to Continue Performance—Section 6(b) of the Act authorizes contracting agencies to include a provision requiring a contractor to continue performance of the contract in accordance with the contracting officer's decision pending final decision on a claim. In general, prior to passage of the Act, the obligation to continue performance applied only to claims arising under a contract. Subparagraph (i) of the new Disputes clause is intended to require continued performance to the same extent as existed under the standard Disputes clause in effect prior to the Act.

7. *Certification of Contractor Claims Over $50,000:*

(a) Section 6(c)(1) of the Act requires that a contractor claim over $50,000 shall be certified that it is made in good faith; that the supporting data are accurate and complete to the best of the contractor's knowledge and belief; and that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable.

(b) The certification shall be executed by the contractor if an individual. When the contractor is not an individual, the certification shall be executed by a

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[4] Except as provided in Sections 4 (maritime contracts) and 10(a)(2) (Tennessee Valley Authority) of the Act.

senior company official in charge at the contractor's plant or location involved, or by an officer or general partner of the contractor having overall responsibility for the conduct of the contractor's affairs.

II. Contract Disputes Clause

The following clause shall be included in all contracts subject to the Contract Disputes Act unless (1) exempted by the head of the Agency under 41 U.S.C. 603(c), or (2) modified in accordance with DAR 1–314 or FPR 1–1.318:

Disputes Clause:

(a) This contract is subject to the Contract Disputes Act of 1978 (Pub. L. 95–563).

(b) Except as provided in the Act, all disputes arising under or relating to this contract shall be resolved in accordance with this clause.

(c) (i) As used herein, "claim" means a written demand or assertion by one of the parties seeking, as a legal right, the payment of money, adjustment or interpretation of contract terms, or other relief, arising under or relating to this contract.

(ii) A voucher, invoice, or request for payment that is not in dispute when submitted is not a claim for the purposes of the Act. However, where such submission is subsequently not acted upon in a reasonable time, or disputed either as to liability or amount, it may be converted to a claim pursuant to the Act.

(iii) A claim by the contractor shall be made in writing and submitted to the contracting officer for decision. A claim by the Government against the contractor shall be subject to a decision by the Contracting Officer.

(d) For contractor claims of more than $50,000, the contractor shall submit with the claim a certification that the claim is made in good faith; the supporting data are accurate and complete to the best of the contractor's knowledge and belief; and the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable. The certification shall be executed by the contractor if an individual. When the contractor is not an individual, the certification shall be executed by a senior company official in charge at the contractor's plant or location involved, or by an officer or general partner of the contractor having overall responsibility for the conduct of the contractor's affairs.

(e) For contractor claims of $50,000 or less, the Contracting Officer must render a decision within 60 days. For contractor claims in excess of $50,000, the Contracting Officer must decide the claim within 60 days or notify the contractor of the date when the decision will be made.

(f) The Contracting Officer's decision shall be final unless the contractor appeals or files a suit as provided in the Act.

(g) The authority of the Contracting Officer under the Act does not extend to claims or disputes which by statute or regulation other agencies are expressly authorized to decide.

(h) Interest on the amount found due on a contractor claim shall be paid from the date the claim is received by the Contracting Officer until the date of payment.

(i) Except as the parties may otherwise agree, pending final resolution of a claim by the contractor arising under the contract, the contractor shall proceed diligently with the performance of the contract in accordance with the contracting officer's decision.

EFFECTIVE DATE: This Policy Letter is effective June 1, 1980, and shall apply to all solicitations and resulting contracts issued on or after June 1, 1980.

CONCURRENCE: This Policy Letter has been concurred in by the Director of OMB.

[FR Doc. 80–13937 Filed 5–8–80; 8:45 am]

BILLING CODE 3110–01–M

Equal Access to Justice Act

Citations:

5 U.S.C. §504, 504 note; 28 U.S.C. §2412, 2412 note (1988); enacted October 21, 1980 as title II of the Small Business Export Expansion Act of 1980, Pub. L. No. 96-481, 94 Stat. 2325; amended September 3, 1982, by Pub. L. No. 97-248, title II, §292, 96 Stat. 574; August 5, 1985, by Pub. L. No. 99-80, 99 Stat. 183; October 8, 1986 by Pub. L. No. 99-509, title VI, §6103(c), 100 Stat. 1948; November 10, 1988 by Pub. L. No. 100-647, title VI, §6239(b), 102 Stat. 3746.

Lead Agencies:

Administrative Conference of the United States, 2120 L Street NW, Washington, DC 20037 (202) 254-7020. Administrative Office of the United States Courts, Washington, DC 20544 (202) 633-6097. Office of the Chief Counsel for Advocacy, U. S. Small Business Administration, 409 3rd Street SW, Washington, DC 20416 (202) 205-6532.

Overview:

Eligibility and Coverage. The Equal Access to Justice Act provides that certain parties who prevail over the federal government in covered litigation are entitled to an award of attorneys' fees and other expenses unless the government can demonstrate that its position was substantially justified or that special circumstances would make an award unjust. The parties eligible to receive such awards include individuals whose net worth is not more than $2,000,000; businesses, organizations, associations or units of local government with a net worth of no more than $7,000,000 and with no more than 500 employees; and tax exempt organizations and agricultural cooperatives with no more than 500 employees, regardless of net worth. The Act covers two groups of proceedings: adversary administrative adjudications, which are defined to include formal hearing proceedings under 5 U.S.C. §554 (other than licensing and ratemaking proceedings, but including license suspension or revocation proceedings) in which the agency takes a position as a party to the proceeding, government contract appeals adjudicated under the Contract Disputes Act of 1978 (41 U.S.C. §§601-613), and administrative civil penalty proceedings under the Program Fraud Civil Remedies Act (31 U.S.C. Chapter 38); and civil court actions other than tort cases (not including tax cases, which are covered by a separate attorneys' fee provision[1]). The Act also authorizes the award of attorneys' fees against the United States in those limited situations in which fees could be awarded against any other party under existing common law and statutory provisions, unless a statute expressly prohibits such an award.

Determining what constitutes an administrative proceeding "under" section 554 has created some controversy, particularly with respect to deportation and other administrative immigration proceedings, which are conducted with procedures equivalent to those required by section 554, even though they are expressly exempted from the Administrative Procedure Act's requirements. The United States Supreme Court recently resolved this issue, ruling that proceedings must be "subject to" section 554 to fall within the Act's coverage (and thus that administrative deportation proceedings are not covered). *Ardestani v. INS*, ___U.S.___, 112 S. Ct. 515 (1991). In other contexts, many courts had already reached a similar conclusion. See, e.g., *St. Louis Fuel & Supply Co. v. FERC*, 890 F.2d 446 (D.C. Cir. 1989) (Department of Energy proceedings not covered by EAJA where formal hearing was provided voluntarily under agency regulations, rather than required by statute); *Haire v. United States*, 869 F.2d 531 (9th Cir. 1989) (Department of Commerce enforcement proceedings under the Export Administration Act not covered by EAJA because specifically exempted from section 554 by statute); *Owens v.*

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[1] 26 U.S.C. §7430. This provision applies to cases commenced after February 28, 1983. Tax cases (other than those in the Tax Court) pending on October 1, 1981 or commenced between that date and March 1, 1983, are covered by the Equal Access to Justice Act.

Brock, 860 F.2d 1363 (6th Cir. 1988) (Department of Labor proceedings under the Federal Employees Compensation Act not covered by EAJA); *Olsen v. Dep't. of Commerce, Census Bureau*, 735 F.2d 558 (Fed. Cir. 1984) (Merit Systems Protection Board proceeding concerning employee tenure not covered by EAJA); *Smedberg Machine & Tool, Inc. v. Donovan*, 730 F.2d 1089 (7th Cir. 1984) (labor certification review at Department of Labor not covered by EAJA).

Applicability. The Equal Access to Justice Act, as amended in 1985, applies to all covered cases and proceedings pending on, or commenced on or after, August 5, 1985. The original Act, which expired under a sunset provision on September 30, 1984, applied to cases and proceedings commenced between October 1, 1981, and September 30, 1984, as well as those pending on October 1, 1981.[2]

Showing Required. A party seeking an award of fees must submit an application to the court or agency adjudicative officer within 30 days of the final judgment (for civil actions) or final disposition (for administrative adjudications) of the underlying proceeding.[3] The application must demonstrate the party's eligibility and include itemized statements from attorneys and expert witnesses for whose services an award is sought. The party must also allege that the position of the United States was not substantially justified, but need not provide supporting evidence; based on the Act's legislative history, the courts have concluded that the federal government bears the burden of showing that its position was substantially justified.

The "position" that must be substantially justified under the Act includes both the government's litigation position and the underlying government action or failure to act leading up to the litigation. The determination of whether the government's position was substantially justified is to be made on the record of the proceeding; discovery on that issue is not permitted. To show that its position was substantially justified, the government must demonstrate that it had a reasonable basis in law and fact. *Pierce v. Underwood*, 487 U.S. 552 (1988).

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[2] Because there was a gap of almost a year between the expiration of the original Act and the effective date of the reenacting legislation, the amended Act's provisions also apply to any case or adjudication commenced on or after October 1, 1984, and finally disposed of before August 5, 1985, provided that the applicant for fees filed an application within 30 days of August 5, 1985. An additional applicability provision authorized the filing of applications for fees in adversary adjudications pending on or commenced on or after October 1, 1981, in which an earlier application had been timely filed but dismissed for want of jurisdiction; this provision was intended to permit the revival of applications for attorneys' fees in certain contract disputes proceedings.

[3] In *Melkonyan v. Sullivan*, ___U.S.___, 111 S. Ct. 2157 (1991), the Supreme Court ruled that when fees are sought under the provisions of the Act applicable to civil actions, the "final judgment" that triggers the 30-day deadline must be rendered by a court rather than by an agency in proceedings on remand from a court.

Amount of Awards. A prevailing party may be awarded attorneys' fees and expenses, including expert witness fees and the cost of studies or tests necessary for case preparation. Under the Act, attorneys' fee awards are limited to $75 an hour unless special factors, such as cost-of-living increases or a shortage of qualified attorneys, justify a higher rate. For administrative proceedings, agencies must make any determination that special factors justify a higher rate by regulation. To date no agencies have done so.[4] Higher rates may be authorized on a case-by-case basis in court proceedings, and many courts have used the provision to award higher rates based on cost-of-living increases. E.g., *Russell v. Sullivan*, 930 F.2d 1443 (9th Cir. 1991); *Phillips v. GSA*, 924 F.2d 1577 (Fed. Cir. 1991); *Johnson v. Sullivan*, 919 F.2d 503 (8th Cir. 1990); *Trichilo v. Secretary, HHS*, 823 F.2d 702 (2d Cir. 1987); *Allen v. Bowen*, 821 F.2d 963 (3rd Cir. 1987); *Sierra Club v. Secretary of the Army*, 820 F.2d 513 (1st Cir. 1987); *Hirschey v. FERC*, 777 F.2d 1 (D.C. Cir. 1985).

Rate increases based on other special factors have been less frequent. The Supreme Court has ruled that traditional attorneys' fee calculation principles, such as lodestar rates or risk multipliers, cannot be used to award rates above the statutory maximum, and that the exception for "limited availability of qualified attorneys" refers to attorneys with specialized knowledge or skills. *Pierce v. Underwood*, *supra*. Lower courts have allowed rates above $75 per hour for specialists in areas such as environmental law, *National Wildlife Federation v. FERC*, 870 F.2d 542 (9th Cir. 1989); Social Security law, *Pirus v. Bowen*, 869 F.2d 536 (9th Cir. 1989); and immigration law, *Nadler v. INS*, 737 F. Supp. 658 (D. D. C. 1989).

The Supreme Court has also ruled that attorneys' fee awards should ordinarily include fees for the portion of the litigation concerning the fee award itself. In *Commissioner, INS v. Jean*, ___ U.S. ___, 110 S. Ct. 2316 (1990), the Court rejected the argument that a separate determination must be made as to whether the government's position on the fee issues was substantially justified before fees could be awarded for fee litigation.

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[4] But see Operative Plasterers and Cement Masons International Association, 91-2 BCA 23,782 (CCH 1991) (DOL Board of Contract Appeals allowed attorneys' fees at a rate in excess of $75 per hour in the absence of a regulation).

Authority of Agencies and Courts. Ordinarily, awards for administrative proceedings are to be made by the presiding agency (which is usually, but not always, the agency that will have to pay any award) and awards for court cases by the court. The Act provides, however, that where a court reviews the decision on the merits in an adversary adjudication, the court shall make any award for the administrative stage as well as the judicial review stage of the proceeding. In some cases, moreover, the courts may make fee awards for administrative proceedings that are not independently covered by the Equal Access to Justice Act. In *Sullivan v. Hudson*, 490 U.S. 877 (1989), the Supreme Court ruled that a court could award EAJA fees for the portion of a Social Security disability proceeding occurring after a court remand, even though the proceeding was not "adversarial" within the meaning of the EAJA. In this case, the party seeking fees did not become a prevailing party under the EAJA until completion of the agency proceeding on remand. The remand proceeding was "intimately tied to the resolution of the judicial action and necessary to the attainment of the results Congress sought to promote by providing for fees," 490 U.S. at 888, and so should be considered an integral part of the "civil action." Lower courts interpreting the *Sullivan v. Hudson* ruling have disagreed on its breadth. *See Full Gospel Portland Church v. Thornburgh*, 927 F.2d 628 (D.C. Cir. 1991) (fees available only where there is a remand under a detailed statutory scheme providing for greater interaction between the agency and the reviewing court than is usual in traditional review of agency action); *Pollgreen v. Morris*, 911 F.2d 527 (11th Cir. 1990) (fees available where there is an "intimate interrelationship" between judicial and agency proceedings, including where initial administrative hearing was provided pursuant to court order). *See also In re Armstead*, 106 BR 405, 2 Ad. L. Rep. 3d 1068 (P & F) (E.D. Pa. 1989) (fees available for HUD administrative proceeding on remand from bankruptcy court).

Agency Procedures. The Act requires agencies to adopt procedures for processing applications for awards in administrative proceedings. More than 30 agencies have issued final procedures for handling applications for attorneys' fee awards in their administrative proceedings. Most of these agencies have generally followed model rules prepared by the Conference in furtherance of its statutory responsibility to consult with agencies in the development of these procedures. The Conference's model rules for implementation of the Act are located in the Appendix to this chapter, and citations to the agencies' individual rules are included below.

Legislative History:

Viewed by Congress both as a small business relief measure and as a regulatory reform bill, the Equal Access to Justice Act was originally passed in 1980 as part of a small business assistance act, to which it was added by amendment on the floor of the Senate. The conference committee accepted the Senate version over a House version of the legislation that did not contain the Equal Access provisions. A substantially identical bill, S. 265, had passed the Senate overwhelmingly in 1979 and had been reported favorably (with a few amendments) by the House Judiciary Committee the day before Senate passage of H.R. 5612. Thus, courts and others interpreting the Act have frequently referred to the congressional reports on S. 265 (cited below) as well as the Conference Report on H.R. 5612. The measure was probably tacked on to H.R. 5612 both to ensure passage before adjournment of the 96th Congress and to forestall a possible presidential veto.

Significant changes from the Senate version made in the House Judiciary Committee (and explained briefly in that Committee's report on S. 265) include the addition of the 500-employee eligibility requirement, the exemption of certain nonprofit organizations from the net worth eligibility requirements, the limitation of covered administrative proceedings to formal adversary adjudications (and the exclusion thereby of most Social Security administrative proceedings) and assignment of the responsibility for fee determinations in administrative proceedings to agency adjudicative officers.

The Act was the subject of continuing legislative attention, in part because of its 3-year sunset provision. A 1982 amendment excluded tax cases from the Act's coverage, creating a separate provision for those cases with different standards and burdens of proof (26 U.S.C. §7430). The House Judiciary Committee's Subcommittee on Courts, Civil Liberties, and the Administration of Justice held oversight hearings on the Equal Access to Justice Act in April 1982, and similar hearings were held by the Senate

Judiciary Committee's Subcommittee on Agency Administration in December of that year.

A Senate bill to amend the Act and make it permanent, S. 919, was reported favorably by the Senate Judiciary Committee in August 1984; a similar House bill, H.R. 5470, was passed by both houses of Congress on October 3, 1984. H.R. 5479 included several important changes to the law. In addition to repealing the sunset provision, it added contract appeals board proceedings (and appeals from board decisions) to those covered by the Act, raised the net worth limits on eligibility for fee awards, and specified that the position of the United States that must be substantially justified to avoid an award included its underlying position as well as its litigation position. In addition, it required the payment of awards from agency funds, deleting an earlier statutory provision that permitted awards to be paid from the general judgment fund of the United States when not paid by the agency.[5]

This legislation was vetoed by President Reagan after Congress had adjourned. The President supported reauthorization of the Act, but objected to two provisions of H.R. 5479: the one that would require consideration of the government's underlying position as well as its litigation position, and another that would have required the payment of interest by the United States on awards not paid within 60 days.

Legislation to extend and amend the Act was reintroduced in the 99th Congress, passed by both Houses of Congress (H.R. 2378), and signed by the President August 5, 1985. In a compromise designed to avoid another veto, the final legislation retained the provision requiring consideration of the government's underlying position, but added a provision that substantial justification determinations are to be made on the record, rather than on the basis of discovery; the provision for the payment of interest was dropped, except where the United States appeals an award of costs or fees in court and the award is later upheld. Two other changes from the 1984 bill appeared in the final legislation. First, while H.R. 5479 would have made the adjudicative officer's decision on a fee application in an administrative proceeding the final decision of the agency, Pub. L. No. 99-80 gave final authority to the agency itself. Also, because the original Act had expired before passage of the new law, a savings provision was included to cover proceedings both commenced and completed during the gap from October 1, 1984 to August 5, 1985.

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[5] An additional provision of the original Act, Section 207, forbade payment from the judgment fund in administrative proceedings unless a special appropriation were made for that purpose; no such special appropriation was ever made.

The Equal Access to Justice Act has subsequently been amended twice: in 1986 to clarify that the administrative provisions of the Act do not apply to tax cases, and in 1988 to add civil penalty proceedings under the Program Fraud Civil Remedies Act to the Act's coverage.

Source Note:

There is no truly comprehensive, up-to-date source of information on the Equal Access to Justice Act. Services and publications that are frequently updated, such as the Federal Attorney Fee Awards Reporter, are the best source of current case law on the Equal Access to Justice Act, though no such publications deal exclusively with Equal Access cases. *Monitoring the Federal Government's Conduct Through Fee Shifting Under the Equal Access to Justice Act--An Inconclusive Experiment*, prepared by Harold J. Krent for the Administrative Conference, offers analysis of some recent case law issues under the Act as well as insight into how the Act has worked in practice; Recommendation 92-5, *Streamlining Attorney's Fee Litigation Under the Equal Access to Justice Act*, based in part on Professor Krent's study, suggests legislative improvements to the Act. The manual *Small Business Attorneys' Fee Recovery: Report on the Equal Access to Justice Act*, issued by the Office of Advocacy of the U.S. Small Business Administration, contains information on state legislative activity not readily available elsewhere, but it has not been updated for several years.

The Bibliography that follows is not intended to be comprehensive, particularly with respect to books and articles about the Act, but to offer a selection of potentially useful publications. Sources before 1985, when the Act was significantly amended, are listed for their background value as well as for their discussion of provisions that remain unchanged. In particular, the preambles to the Conference's proposed and final rules for agency implementation of the original Act (as well as the 1985 amendments) contain extensive discussion of many questions concerning interpretation of the Equal Access to Justice Act, as does the Justice Department's 1985 publication, *Award of Attorneys' Fees and Other Expenses in Judicial Proceedings Under* *the Equal Access to Justice Act*. Even more recent articles may not accurately reflect the current state of the law in view of the number of recent significant case law developments in this area.

Statistical information on the amount of fees and expenses awarded under the Act in many administrative proceedings and court cases appears in annual reports by the Chairman of the Administrative Conference of the United States and the Director of the Administrative Office of the U.S. Courts, respectively. Because these reports depend on the accuracy and completeness of the information provided by the agencies and the courts, they are not necessarily comprehensive.

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1. Committee of Conference, *Conference Report to Accompany H.R. 5612*, H.R. Rep. No. 96-1434, 96th Cong., 2d Sess. (1980).

2. *Hearings on H.R. 2223, Equal Access to Justice Act Amendments, before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary*, 99th Cong., 1st Sess. (1985).

3. *Hearings on S. 265, Award of Attorneys' Fees Against the Federal Government, before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary*, 96th Cong., 2d Sess. (1980).

4. *Hearings on S. 265 before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary*, 96th Cong., 1st. Sess. (1979).

5. House of Representatives Committee on the Judiciary, *Report to Accompany H.R. 2378*, H. R. Rep. 99-120, 99th Cong., 1st Sess. (pt. I, May 15, 1985; pt. II, June 13, 1985).

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II. Other Government Documents

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2. Administrative Conference of the U.S., *Report of the Chairman of the Administrative Conference of the United States on Agency Activities Under the Equal Access to Justice Act, October 1, 1989-September 30, 1990* (1991). (See also reports for the fiscal years 1982 through 1989.)

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4. Administrative Conference of the U.S., Model Rules for Agency Implementation of the Equal Access to Justice Act, 46 Fed. Reg. 32900 (June 25, 1981).

5. Administrative Conference of the U.S., Draft Revised Model Rules for Implementation of the Equal Access to Justice Act, 50 Fed. Reg. 46250 (November 6, 1985).

6. Administrative Conference of the U.S., Model Rules for Implementation of the Equal Access to Justice Act in Agency Proceedings, 1 CFR Part 315 (1991).

7. Administrative Office of the United States Courts, Report by the Director of the Administrative Office of the United States Courts of Requests for Fees and Expenses Under the Equal Access to Justice Act of 1980, July 1, 1989-June 30, 1990, reprinted in Annual Report of the Director of the Administrative Office of the United States Courts 1990 (1990) (at 34). (See also annual reports for 1982 through 1989.)

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9. Note, *Determining Fees for Fees Under the Equal Access to Justice Act: Accomplishing the Act's Goals*, 9 Cardozo L. Rev. 1091 (1988).

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Consumer Product Safety Commission	16 CFR §§1025.70-1025.72
Education	34 CFR Part 21
Environmental Protection Agency	40 CFR Part 17
Federal Aviation Administration	14 CFR Part 14
Federal Communications Commission	47 CFR §§1.1501-1.530
Federal Deposit Insurance Corporation	12 CFR §§308.113-308.127
Federal Labor Relations Authority	5 CFR Part 2430
Federal Maritime Commission	46 CFR §§502.501-502.503
Federal Mine Safety and Health Review Commission	29 CFR Part 2704
Federal Trade Commission	16 CFR §§3.81-3.83
Health and Human Services	45 CFR Part 13

Housing and Urban Development	24 CFR Part 14
Interior	43 CFR §§4.601-4.619
International Trade Commission	19 CFR Part 212
Interstate Commerce Commission	49 CFR Part 1016
Justice	28 CFR Part 24
Labor	29 CFR Part 16
National Aeronautics and Space Administration	14 CFR Part 1262
National Credit Union Administration	12 CFR §§747.901-747.916
National Labor Relations Board	29 CFR §§102.143-102.155
National Transportation Safety Board	49 CFR Part 826
Occupational Safety and Health Review Commission	29 CFR Part 2204
Postal Service	39 CFR Part 960
Securities and Exchange Commission	17 CFR §§201.31-201.60
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Treasury	31 CFR Part 6

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Merit Systems Protection Board	47 Fed. Reg. 52184 (Nov. 19, 1982).
Nuclear Regulatory Commission	46 Fed. Reg. 53189 (Oct. 28, 1981).

Appendix:

1. Equal Access to Justice Act, 5 U.S.C. §504, 504 note; 28 U.S.C. §2412, 2412 note (1988).
2. Administrative Conference of the U.S., Model Rules for Implementation of the Equal Access to Justice Act, 1 CFR Part 315 (1991).

Equal Access to Justice Act

Title 5, U.S. Code

§504. Costs and fees of parties

(a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

(2) A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement from any attorney, agent, or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the agency was not substantially justified. When the United States appeals the underlying merits of an adversary adjudication, no decision on an application for fees and other expenses in connection with that adversary adjudication shall be made under this section until a final and unreviewable decision is rendered by the court on the appeal or until the underlying merits of the case have been finally determined pursuant to the appeal.

(3) The adjudicative officer of the agency may reduce the amount to be awarded, or deny an award, to the extent that the party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy. The decision of the adjudicative officer of the agency under this section shall be made a part of the record containing the final decision of the agency and shall include written findings and conclusions and the reason or basis therefor. The decision of the agency on the application for fees and other expenses shall be the final administrative decision under this section.

(b)(1) For the purposes of this section--

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees (The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved, and (ii) attorney or agent fees shall not be awarded in excess of $75 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee.);

(B) "party" means a party, as defined in section 551(3) of this title, who is (i) an individual whose net worth did not exceed $2,000,000 at the time the adversary adjudication was initiated, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the adversary adjudication was initiated, and which had not more than 500 employees at the time the adversary adjudication was initiated; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association;

(C) "adversary adjudication" means (i) an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license, (ii) any appeal of a decision made pursuant to section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 605) before an agency board of contract appeals as provided in section 8 of that Act (41 U.S.C. 607), and (iii) any hearing conducted under chapter 38 of title 31;

(D) "adjudicative officer" means the deciding official, without regard to whether the official is designated as an administrative law judge, a hearing officer or examiner, or otherwise, who presided at the adversary adjudication; and

(E) "position of the agency" means, in addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the agency upon which the adversary adjudication is based; except that fees and other expenses may not be awarded to a party for any portion of the adversary adjudication in which the party has unreasonably protracted the proceedings.

(2) Except as otherwise provided in paragraph (1), the definitions provided in section 551 of this title apply to this section.

(c)(1) After consultation with the Chairman of the Administrative Conference of the United States, each agency shall by rule establish uniform procedures for the submission and consideration of applications for an award of fees and other expenses. If a court reviews the underlying decision of the adversary adjudication, an award for fees and other expenses may be made only pursuant to section 2412(d)(3) of title 28, United States Code.

(2) If a party other than the United States is dissatisfied with a determination of fees and other expenses made under subsection (a), that party may, within 30 days after the determination is made, appeal the determination to the court of the United States having jurisdiction to review the merits of the underlying decision of the agency adversary adjudication. The court's determination on any appeal heard under this paragraph shall be based solely on the factual record made before the agency. The court may modify the determination of fees and other expenses only if the court finds that the failure to make an award of fees and other expenses, or the calculation of the amount of the award, was unsupported by substantial evidence.

(d) Fees and other expenses awarded under this subsection shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise.

(e) The Chairman of the Administrative Conference of the United States, after consultation with the Chief Counsel for Advocacy of the Small Business Administration, shall report annually to the Congress on the amount of fees and other expenses awarded during the preceding fiscal year pursuant to this section. The report shall describe the number, nature, and amount of the awards, the claims involved in the controversy, and any other relevant information which may aid the Congress in evaluating the scope and impact of such awards. Each agency shall provide the Chairman with such information as is necessary for the Chairman to comply with the requirements of this subsection.

(f) No award may be made under this section for costs, fees, or other expenses which may be awarded under section 7430 of the Internal Revenue Code of 1986.

(Added Pub. L. No. 96-481, title II, §203(a)(1), (c), Oct. 21, 1980, 94 Stat. 2325, 2327; revived and amended Pub. L. No. 99-80, §§1, 6, Aug. 5, 1985, 99 Stat. 183, 186; Pub. L. No. 99-509, title VI, §6103(c), Oct. 21, 1986, 100 Stat. 1948; Pub. L. No. 99-514, §2, Oct. 22, 1986, 100 Stat. 2095; Pub. L. No. 100-647, title VI, §6239(b), Nov. 10, 1988, 102 Stat. 3746.)

AMENDMENTS

1988 Subsec. (f). Pub. L. No. 100-647 added subsec. (f).

1986 Subsec. (b)(1)(B). Pub. L. No. 99-514 substituted "Internal Revenue Code of 1986" for "Internal Revenue Code of 1954".

Subsec. (b)(1)(C)(iii). Pub. L. No. 99-509 added cl. (iii).

1985 Subsec. (a)(1). Pub. L. No. 99-80, §1(a)(1), (2), struck out "as a party to the proceeding" after "the position of the agency", and inserted "Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought."

Subsec. (a)(2). Pub. L. No. 99-80, §1(b), inserted "When the United States appeals the underlying merits of an adversary adjudication, no decision on an application for fees and other expenses in connection with that adversary adjudication shall be made under this section until a final and unreviewable decision is rendered by the court on the appeal or until the under⌞lying merits of the case have been finally determined pursuant to the appeal."

Subsec. (a)(3). Pub. L. No. 99-80, §1(a)(3), inserted "The decision of the agency on the application for fees and other expenses shall be the final administrative decision under this section."

Subsec. (b)(1)(B). Pub. L. No. 99-80, §1(c)(1), amended subpar. (B) generally. Prior to amendment, subpar. (B) read as follows: " `party' means a party, as defined in section 551(3) of this title, which is an individual, partnership, corporation, association, or public or private organization other than an agency, but excludes (i) any individual whose net worth exceeded $1,000,000 at the time the adversary adjudication was initiated, and any sole owner of an unincorporated business, or any partnership, corporation, association, or organization whose net worth exceeded $5,000,000 at the time the adversary adjudication was initiated, except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of the Code and a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association, and (ii) any sole owner of an unincorporated business, or any partnership, corporation, association, or organization, having more than 500 employees at the time the adversary adjudication was initiated;".

Subsec. (b)(1)(C). Pub. L. No. 99-80, §1(c)(2), designated existing provisions of subpar. (C) as cl. (i) thereof by inserting "(i)" before "an adjudication under", added cl. (ii), and struck out ``and'' after the semicolon at the end.

Subsec. (b)(1)(D), (E). Pub. L. No. 99-80, §1(c)(3), substituted "; and" for the period at end of subpar. (D), and added subpar. (E).

Subsec. (c)(2). Pub. L. No. 99-80, §1(d), amended par. (2) generally. Prior to amendment, par. (2) read as follows: "A party dissatisfied with the fee determination made under subsection (a) may petition for leave to appeal to the court of the United States having jurisdiction to review the merits of the underlying decision of the agency adversary adjudication. If the court denies the petition for leave to appeal, no appeal may be taken from the denial. If the court grants the petition, it may modify the determination only if it finds that the failure to make an award, or the calculation of the amount of the award, was an abuse of discretion."

Subsec. (d). Pub. L. No. 99-80, §1(e), amended subsec. (d) generally. Prior to amendment, subsec. (d) read as follows:

"(1) Fees and other expenses awarded under this section may be paid by any agency over which the party prevails from any funds made available to the agency, by appropriation or otherwise, for such purpose. If not paid by any agency, the fees and other expenses shall be paid in the same manner as the payment of final judgments is made pursuant to section 2414 of title 28, United States Code.

"(2) There is authorized to be appropriated to each agency for each of the fiscal years 1982, 1983, and 1984, such sums as may be necessary to pay fees and other expenses awarded under this section in such fiscal years."

1980 Pub. L. No. 96-481, §203(c), which provided for the repeal of this section effective Oct. 1, 1984, was itself repealed and this section was revived by section 6 of Pub. L. No. 99-80.

CONGRESSIONAL FINDINGS AND PURPOSES

Section 202 of title II of Pub. L. No. 96-481 provided that:

"(a) The Congress finds that certain individuals, partnerships, corporations, and labor and other organizations may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights in civil actions and in administrative proceedings.

"(b) The Congress further finds that because of the greater resources and expertise of the United States the standard for an award of fees against the United States should be different from the standard governing an award against a private litigant, in certain situations.

"(c) It is the purpose of this title--

"(1) to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in specified situations an award of attorney fees, expert witness fees, and other costs against the United States; and

"(2) to insure the applicability in actions by or against the United States of the common law and statutory exceptions to the `American rule' respecting the award of attorney fees."

Limitation on Payments

Section 207 of title II of Pub. L. No. 96-481, which provided that the payment of judgments, fees and other expenses in the same manner as the payment of final judgments as provided in this Act would be effective only to the extent and in such amounts as are provided in advance in appropriation Acts, was repealed by Pub. L. No. 99-80, §4, Aug. 5, 1985, 99 Stat. 186.

* * * *

Title 28, U.S. Code

§2412. Costs and fees

(a) Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the United States shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation.

(b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

(c)(1) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for costs pursuant to subsection (a) shall be paid as provided in sections 2414 and 2517 of this title and shall be in addition to any relief provided in the judgment.

(2) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for fees and expenses of

attorneys pursuant to subsection (b) shall be paid as provided in sections 2414 and 2517 of this title, except that if the basis for the award is a finding that the United States acted in bad faith, then the award shall be paid by any agency found to have acted in bad faith and shall be in addition to any relief provided in the judgment.

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

(C) The court, in its discretion, may reduce the amount to be awarded pursuant to this subsection, or deny an award, to the extent that the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

(2) For the purposes of this subsection-

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.);

(B) "party" means (i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association;

(C) "United States" includes any agency and any official of the United States acting in his or her official capacity;

(D) "position of the United States" means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings;

(E) "civil action brought by or against the United States" includes an appeal by a party, other than the United States, from a decision of a contracting officer rendered pursuant to a disputes clause in a contract with the Government or pursuant to the Contract Disputes Act of 1978;

(F) "court" includes the United States Claims Court;

(G) "final judgment" means a judgment that is final and not appealable, and includes an order of settlement; and

(H) "prevailing party", in the case of eminent domain proceedings, means a party who obtains a final judgment (other than by settlement), exclusive of interest, the amount of which is at least as close to the highest valuation of the property involved that is attested to at trial on behalf of the property owner as it is to the highest valuation of the property involved that is attested to at trial on behalf of the Government.

(3) In awarding fees and other expenses under this subsection to a prevailing party in any action for judicial review of an adversary adjudication, as defined in subsection (b)(1)(C) of section 504 of title 5, United States Code, or an adversary adjudication subject to the Contract Disputes Act of 1978, the court shall include in that award fees and other expenses to the same extent authorized in subsection (a) of such section, unless the court finds that during such adversary adjudication the position of the United States was substantially justified, or that special circumstances make an award unjust.

(4) Fees and other expenses awarded under this subsection to a party shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise.

(5) The Director of the Administrative Office of the United States Courts shall include in the annual report prepared pursuant to section 604 of this title, the amount of fees and other expenses awarded during the preceding fiscal year pursuant to this subsection. The report shall describe the number, nature, and amount of the awards, the claims involved in the controversy, and any other relevant information which may aid the Congress in evaluating the scope and impact of such awards.

(e) The provisions of this section shall not apply to any costs, fees, and other expenses in connection with any proceeding to which section 7430 of the Internal Revenue Code of 1986 applies (determined without regard to subsections (b) and (f) of such section). Nothing in the preceding sentence shall prevent the awarding under subsection (a) of section 2412 of title 28, United States Code, of costs enumerated in section 1920 of such title (as in effect on October 1, 1981).

(f) If the United States appeals an award of costs or fees and other expenses made against the United States under this section and the award is affirmed in whole or in part, interest shall be paid on the amount of the award as affirmed. Such interest shall be computed at the rate determined under section 1961(a) of this title, and shall run from the date of the award through the day before the date of the mandate of affirmance.

(June 25, 1948, ch. 646, 62 Stat. 973; July 18, 1966, Pub. L. No. 89-507, §1, 80 Stat. 308; Oct. 21, 1980, Pub. L. No. 96-481, title II, §204(a), (c), 94 Stat. 2327, 2329; Sept. 3, 1982, Pub. L. No. 97-248, title II, §292(c), 96 Stat. 574; Aug. 5, 1985, Pub. L. No. 99-80, §§2, 6, 99 Stat. 184, 186; Oct. 22, 1986, Pub. L. No. 99-514, §2, 100 Stat. 2095).

AMENDMENTS

1986 Subsecs. (d)(2)(B), (e). Pub. L. No. 99-514 substituted "Internal Revenue Code of 1986" for "Internal Revenue Code of 1954".

1985 Subsecs. (a), (b). Pub. L. No. 99-80, §2(a)(1), substituted "or any agency or any official of the United States" for "or any agency and any official of the United States".

Subsec. (d). Pub. L. No. 99-80, §6, repealed amendment made by Pub. L. No. 96-481, §204(c), and provided that subsec. (d) was effective on or after Aug. 5, 1985, as if it had not been repealed by section 204(c). See 1980 Amendment note and Revival of Previously Repealed Provisions note below.

Subsec. (d)(1)(A). Pub. L. No. 99-80, §2(a)(2), inserted ", including proceedings for judicial review of agency actions," after "in tort)".

Subsec. (d)(1)(B). Pub. L. No. 99-80, §2(b), inserted provisions directing that whether or not the position of the United States was substantially justified must be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action was based) which is made in the civil action for which fees and other expenses are sought.

Subsec. (d)(2)(B). Pub. L. No. 99-80, §2(c)(1), substituted "$2,000,000" for "$1,000,000" in cl. (i), and substituted "or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association;" for "(ii) a sole owner of an unincorporated business, or a partnership, corporation, association, or organization whose net worth did not exceed $5,000,000 at the time the civil action was filed, except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of the Code and a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association, or (iii) a sole owner of an unincorporated business, or a partnership, corporation, association, or organization, having not more than 500 employees at the time the civil action was filed; and".

Subsec. (d)(2)(D) to (H). Pub. L. No. 99-80, §2(c)(2), added subpars. (D) to (H).

Subsec. (d)(4). Pub. L. No. 99-80, §2(d), amended par. (4) generally. Prior to amendment, par. (4) read as follows:

"(A) Fees and other expenses awarded under this subsection may be paid by any agency over which the party prevails from any funds made available to the agency, by appropriation or otherwise, for such purpose. If not paid by any agency, the fees and other expenses shall be paid in the same manner as the payment of final judgments is made in accordance with sections 2414 and 2517 of this title.

"(B) There is authorized to be appropriated to each agency for each of the fiscal years 1982, 1983, and 1984, such sums as may be necessary to pay fees and other expenses awarded pursuant to this subsection in such fiscal years."

Subsec. (f). Pub. L. No. 99-80, §2(e), added subsec. (f).

1982 Subsec. (e). Pub. L. No. 97-248 added subsec. (e).

1980 Pub. L. No. 96-481, §204(a), designated existing provisions as subsec. (a), struck out provision that payment of a judgment for costs shall be as provided in section 2414 and section 2517 of this title for the payment of judgments against the United States, and added subsecs. (b) to (d). Pub. L. No. 96-481, §204(c), repealed subsec. (d) eff. Oct. 1, 1984. See Effective Date of 1980Amendment note below.

1966 Pub. L. No. 89-507 empowered a court having jurisdiction to award judgment for costs, except as otherwise specifically provided by statute, to the prevailing party in any action brought by or against the United States or any agency or official of the United States acting in his official capacity, limited the judgment for costs when taxed against the Government to reimbursing in whole or in part the prevailing party for costs incurred by him in the litigation, required the payment of a judgment for costs to be as provided in section 2414 and section 2517 of this title for the payment of judgments against the United States and eliminated provisions which limited the liability of the United States for fees and costs to those cases in which liability was expressed provided for by Act of Congress, permitted the district court or the Court of Claims, in an action under section 1346(a) or 1491 of this title if the United States put in issue plaintiff's right to recover, to allow costs to the prevailing party from the time of joining such issue, and which authorized the allowance of costs to the successful claimant in an action under section 1346(b) of this title.

Administrative Conference of the U.S.

Model Rules for Implementation of the Equal Access to Justice Act, 1 CFR Part 315 (1991)

PART 315—MODEL RULES FOR IMPLEMENTATION OF THE EQUAL ACCESS TO JUSTICE ACT IN AGENCY PROCEEDINGS

Subpart A—General Provisions

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AUTHORITY: Sec. 203(a)(1), Pub. L. 96-481, 94 Stat. 2325 (5 U.S.C. 504(c)(1)); Pub. L. 99-80, 99 Stat. 183.

SOURCE: 51 FR 16665, May 6, 1986, unless otherwise noted.

Subpart A—General Provisions

§ 315.101 Purpose of these rules.

The Equal Access to Justice Act, 5 U.S.C. 504 (called "the Act" in this part), provides for the award of attorney fees and other expenses to eligible individuals and entities who are parties to certain administrative proceedings (called "adversary adjudications") before this agency. An eligible party may receive an award when it prevails over an agency, unless the agency's position was substantially justified or special circumstances make an award unjust. The rules in this part describe the parties eligible for awards and the proceedings that are covered. They also explain how to apply for awards, and the procedures and standards that this agency will use to make them.

§ 315.102 When the Act applies.

The Act applies to any adversary adjudication pending or commenced before this agency on or after August 5, 1985. It also applies to any adversary adjudication commenced on or after October 1, 1984, and finally disposed of before August 5, 1985, provided that an application for fees and expenses, as described in Subpart B of these rules, has been filed with the agency within 30 days after August 5, 1985, and to any adversary adjudication pending on or commenced on or after October 1, 1981, in which an application for fees and other expenses was timely filed and was dismissed for lack of jurisdiction.

§ 315.103 Proceedings covered.

(a) The Act applies to adversary adjudications conducted by this agency. These are (1) adjudications under 5 U.S.C. 554 in which the position of this or any other agency of the United States, or any component of an agency, is presented by an attorney or other representative who enters an appearance and participates in the proceeding, and (2) appeals of decisions of contracting officers made pursuant to section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 605) before agency boards of contract appeals as provided in section 8 of that Act (41 U.S.C. 607). Any proceeding in which this agency may prescribe a lawful present or future rate is not covered by the Act. Proceedings to grant or renew licenses are also excluded, but proceedings to modify, suspend, or revoke licenses are covered if they are otherwise "adversary adjudications." For this agency, the types of proceedings generally covered include: [to be supplied by the agency]

Alt. 315.103(a): [for use by contract appeals boards] The Act applies to appeals of decisions of contracting officers made pursuant to section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 605) before this board as provided in section 8 of that Act (41 U.S.C. 607).

(b) This agency's failure to identify a type of proceeding as an adversary adjudication shall not preclude the filing of an application by a party who believes the proceeding is covered by the Act; whether the proceeding is covered will then be an issue for resolution in proceedings on the application.

(c) If a proceeding includes both matters covered by the Act and matters specifically excluded from coverage, any award made will include only fees and expenses related to covered issues.

§ 315.104 Eligibility of applicants.

(a) To be eligible for an award of attorney fees and other expenses under the Act, the applicant must be a party to the adversary adjudication for which it seeks an award. The term "party" is defined in 5 U.S.C. 551(3). The applicant must show that it meets all conditions of eligibility set out in this subpart and in subpart B.

(b) The types of eligible applicants are as follows:

(1) An individual with a net worth of not more than $2 million;

(2) The sole owner of an unincorporated business who has a net worth of not more than $7 million, including both personal and business interests, and not more than 500 employees;

(3) A charitable or other tax-exempt organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) with not more than 500 employees;

(4) A cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)) with not more than 500 employees; and

(5) Any other partnership, corporation, association, unit of local government, or organization with a net worth of not more than $7 million and not more than 500 employees.

(c) For the purpose of eligibility, the net worth and number of employees of an applicant shall be determined as of the date the proceeding was initiated.

Alt. 315.104(c): [for use by contract appeals boards] For the purpose of eligibility, the net worth and number of employees of an applicant shall be determined as of the date the applicant filed its appeal under 41 U.S.C. 606.

(d) An applicant who owns an unincorporated business will be considered as an "individual" rather than a "sole owner of an unincorporated business" if the issues on which the applicant prevails are related primarily to personal interests rather than to business interests.

(e) The employees of an applicant include all persons who regularly perform services for renumeration for the applicant, under the applicant's direction and control. Part-time employees shall be included on a proportional basis.

(f) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. Any individual, corporation or other entity that directly or indirectly controls or owns a majority of the voting shares or other interests of the applicant, or any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest, will be considered an affiliate for purposes of this part, unless the adjudicative officer determines that such treatment would be unjust and contrary to the purposes of the Act in light of the actual relationship between the affiliated entities. In addition, the adjudicative officer may determine that financial relationships of the applicant other than those described in this paragraph constitute special circumstances that would make an award unjust.

(g) An applicant that participates in a proceeding primarily on behalf of one or more other persons or entities that would be ineligible is not itself eligible for an award.

§ 315.105 Standards for awards.

(a) A prevailing applicant may receive an award for fees and expenses incurred in connection with a proceeding or in a significant and discrete substantive portion of the proceeding, unless the position of the agency over which the applicant has prevailed was substantially justified. The position of the agency includes, in addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the agency upon which the adversary adjudication is based. The burden of proof that an award should not be made to an ineligible prevailing applicant because the agency's position was substantially justified is on the agency counsel.

(b) An award will be reduced or denied if the applicant has unduly or unreasonably protracted the proceeding or if special circumstances make the award sought unjust.

§ 315.106 Allowable fees and expenses.

(a) Awards will be based on rates customarily charged by persons engaged in the business of acting as attorneys, agents and expert witnesses, even if the services were made available without charge or at reduced rate to the applicant.

(b) No award for the fee of an attorney or agent under these rules may exceed $75.00 per hour. No award to compensate an expert witness may exceed the highest rate at which this agency pays expert witnesses, which is [to be supplied by the agency]. However, an award may also include the reasonable expenses of the attorney, agent, or witness as a separate item, if the attorney, agent or witness ordinarily charges clients separately for such expenses.

(c) In determining the reasonableness of the fee sought for an attorney, agent or expert witness, the adjudicative officer shall consider the following:

(1) If the attorney, agent or witness is in private practice, his or her customary fees for similar services, or, if an employee of the applicant, the fully allocated costs of the services;

(2) The prevailing rate for similar services in the community in which the attorney, agent or witness ordinarily performs services;

(3) The time actually spent in the representation of the applicant;

(4) The time reasonably spent in light of the difficulty or complexity of the issues in the proceeding; and

(5) Such other factors as may bear on the value of the services provided.

(d) The reasonable cost of any study, analysis, engineering report, test, project or similar matter prepared on behalf of a party may be awarded, to the extent that the charge for the services does not exceed the prevailing rate for similar services, and the study or other matter was necessary for preparation of applicant's case.

§ 315.107 Rulemaking on maximum rates for attorney fees.

(a) If warranted by an increase in the cost of living or by special circumstances (such as limited availability of attorneys qualified to handle certain types of proceedings), this agency may adopt regulations providing that attorney fees may be awarded at a rate higher than $75 per hour in some or all of the types of proceedings covered by this part. This agency will conduct any rulemaking proceedings for this purpose under the informal rulemaking procedures of the Administrative Procedure Act.

(b) Any person may file with this agency a petition for rulemaking to increase the maximum rate for attorney fees, in accordance with [cross-reference to, or description of, standard agency procedure for rulemaking petitions.] The petition should identify the rate the petitioner believes this agency should establish and the types of proceedings in which the rate should be used. It should also explain fully the reasons why the higher rate is warranted. This agency will respond to the petition within 60 days after it is filed, by initiating a rulemaking proceeding, denying the petition, or taking other appropriate action.

§ 315.108 Awards against other agencies.

If an applicant is entitled to an award because it prevails over another agency of the United States that participates in a proceeding before this agency and takes a position that is not substantially justified, the award or an approriate portion of the award shall be made against that agency.

§ 315.109 Delegations of authority.

This agency delegates to [identify appropriate agency unit or officer] authority to take final action on matters pertaining to the Equal Access to Justice Act, 5 U.S.C. 504, in actions arising under [list statutes or types of proceedings.] This agency may by order delegate authority to take final action on matters pertaining to the Equal Access to Justice Act in particular cases to other subordinate officials or bodies.

Alt. 315.109: [Contract appeals boards may omit this section.]

Subpart B—Information Required From Applicants

§ 315.201 Contents of application.

(a) An application for an award of fees and expenses under the Act shall identify the applicant and the proceeding for which an award is sought. The application shall show that the applicant has prevailed and identify the position of an agency or agencies that the applicant alleges was not substantially justified. Unless the applicant is an individual, the application shall also state the number of employees of the applicant and describe briefly the type and purpose of its organization or business.

(b) The application shall also include a statement that the applicant's net worth does not exceed $2 million (if an individual) or $7 million (for all other applicants, including their affiliates). However, an applicant may omit this statement if:

(1) It attaches a copy of a ruling by the Internal Revenue Service that it qualifies as an organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) or, in the case of a tax-exempt organization not required to obtain a ruling from the Internal Revenue Service on its exempt status, a statement that describes the basis for the applicant's belief that it qualifies under such section; or

(2) It states that it is a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)).

(c) The application shall state the amount of fees and expenses for which an award is sought.

(d) The application may also include any other matters that the applicant wishes this agency to consider in determining whether and in what amount an award should be made.

(e) The application shall be signed by the applicant or an authorized officer or attorney of the applicant. It shall also contain or be accompanied by a written verification under oath or under penalty of perjury that the information provided in the application is true and correct.

§ 315.202 Net worth exhibit.

(a) Each applicant except a qualified tax-exempt organization or cooperative association must provide with its application a detailed exhibit showing the new worth of the applicant and any affiliates (as defined in § 315.104(f) of this part) when the proceeding was initiated. The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's and its affiliates' assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this part. The adjudicative officer may require an applicant to file additional information to determine its eligibility for an award.

(b) Ordinarily, the net worth exhibit will be included in the public record of the proceeding. However, an applicant that objects to public disclosure of information in any portion of the exhibit and believes there are legal grounds for withholding it from disclosure may submit that portion of the exhibit directly to the adjudicative officer in a sealed envelope labeled "Confidential Financial Information," accompanied by a motion to withhold the information from public disclosure. The motion shall describe the information sought to be withheld and explain, in detail, why it falls within one or more of the specific exemptions from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552(b) (1)-(9), why public disclosure of the information would adversely affect the applicant, and why disclosure is not required in the public interest. The material in question shall be served on counsel representing the agency against which the applicant seeks an award, but need not be served on any other party to the proceeding. If the adjudicative officer finds that the information should not be withheld from disclosure, it shall be placed in the public record of the proceeding. Otherwise, any request to inspect or copy the exhibit shall be disposed of in accordance with this agency's established procedures under the Freedom of Information Act [insert cross reference to agency FOIA rules].

§ 315.203 Documentation of fees and expenses.

The application shall be accompanied by full documentation of the fees and expenses, including the cost of any study, analysis, engineering report, test, project or similar matter, for which an award is sought. A separate itemized statement shall be submitted for each professional firm or individual whose services are covered by the application, showing the hours spent in connection with the proceeding by each individual, a description of the specific services performed, the rates at which each fee has been computed, any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by any other person or entity for the services provided. The adjudicative officer may require the applicant to provide vouchers, receipts, logs, or other substantiation for any fees or expenses claimed, pursuant to § 315.306 of these rules.

§ 315.204 When an application may be filed.

(a) An application may be filed whenever the applicant has prevailed in the proceeding or in a significant and discrete substantive portion of the proceeding, but in no case later than 30 days after this agency's final disposition of the proceeding.

(b) For purposes of this rule, final disposition means the date on which a decision or order disposing of the merits of the proceeding or any other complete resolution of the proceeding, such as a settlement or voluntary dismissal, become a final and unappealable, both within the agency and to the courts.

(c) If review or reconsideration is sought or taken of a decision as to which an applicant believes it has prevailed, proceedings for the award of fees shall be stayed pending final disposition of the underlying controversy. When the United States appeals the underlying merits of an adversary adjudication to a court, no decision on an application for fees and other expenses in connection with that adversary adjudication shall be made until a final and unreviewable decision is rendered by the court on the appeal or until the underlying merits of the case have been finally determined pursuant to the appeal.

Subpart C—Procedures for Considering Applications

§ 315.301 Filing and service of documents.

Any application for an award or other pleading or document related to an application shall be filed and served on all parties to the proceeding in the same manner as other pleadings in the proceeding, except as provided in § 315.202(b) for confidential financial information.

§ 315.302 Answer to application.

(a) Within 30 days after service of an application, counsel representing the agency against which an award is sought may file an answer to the application. Unless agency counsel requests an extension of time for filing or files a statement of intent to negotiate under paragraph (b) of this section, failure to file an answer within the 30-day period may be treated as a consent to the award requested.

(b) If agency counsel and the applicant believe that the issues in the fee application can be settled, they may jointly file a statement of their intent to negotiate a settlement. The filing of this statement shall extend the time for filing an answer for an additional 30 days, and further extensions may be granted by the adjudicative officer upon request by agency counsel and the applicant.

(c) The answer shall explain in detail any objections to the award requested and identify the facts relied on in support of agency counsel's position. If the answer is based on any alleged facts not already in the record of the proceeding, agency counsel shall include with the answer either supporting affidavits or a request for further proceedings under § 315.306.

§ 315.303 Reply.

Within 15 days after service of an answer, the applicant may file a reply. If the reply is based on any alleged facts not already in the record of the proceeding, the applicant shall include with the reply either supporting affidavits or a request for further proceedings under § 315.306.

§ 315.304 Comments by other parties.

Any party to a proceeding other than the applicant and agency counsel may file comments on an application within 30 days after it is served or on an answer within 15 days after it is served. A commenting party may not participate further in proceedings on the application unless the adjudicative officer determines that the public interest requires such participation in order to permit full exploration of matters raised in the comments.

§ 315.305 Settlement.

The application and agency counsel may agree on a proposed settlement of the award before final action on the application, either in connection with a settlement of the underlying proceeding, or after the underlying proceeding has been concluded, in accordance with the agency's standard settlement procedure. If a prevailing party and agency counsel agree on a proposed settlement of an award before an application has been filed, the application shall be filed with the proposed settlement.

§ 315.306 Further proceedings.

(a) Ordinarily, the determination of an award will be made on the basis of the written record. However, on request of either the applicant or agency counsel, or on his or her own initiative, the adjudicative officer may order further proceedings, such as an informal conference, oral argument, additional written submissions or, as to issues other than substantial justification (such as the applicant's eligibility or substantiation of fees and expenses), pertinent discovery or an evidentiary hearing. Such further proceedings shall be held only when necessary for full and fair resolution of the issues arising from the application, and shall be conducted as promptly as possible. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

(b) A request that the adjudicative officer order further proceedings under this section shall specifically identify the information sought or the disputed issues and shall explain why the additional proceedings are necessary to resolve the issues.

§ 315.307 Decision.

The adjudicative officer shall issue an initial decision on the application within [to be supplied by the agency] days after completion of proceedings on the application. The decision shall include written findings and conclusions on the applicant's eligibility and status as a prevailing party, and an explanation of the reasons for any difference between the amount requested and the amount awarded. The decision shall also include, if at issue, findings on whether the agency's position was substantially justified, whether the applicant unduly protracted the proceedings, or whether special circumstances make an award unjust. If the applicant has sought an award against more than one agency, the decision shall allocate responsibility for payment of any award made among the agencies, and shall explain the reasons for the allocation made.

Alt. 315.307 [for use by contract appeals boards] The Board shall issue its decision on the application within [to be supplied by the agency] days after completion of proceedings on the application. Whenever possible, the decision shall be made by the same administrative judge or panel that decided the contract appeal for which fees are sought. The decision shall include written findings . . . . [Continue as in 315.307, from the second sentence to the end.]

§ 315.308 Agency review.

Either the applicant or agency counsel may seek review of the initial decision on the fee application, or the agency may decide to review the decision on its own initiative, in accordance with [cross-reference to agency's regular review procedures.] If neither the applicant nor agency counsel seeks review and the agency does not take review on its own initiative, the initial decision on the application shall become a final decision of the agency [30] days after it is issued. Whether to review a decision is a matter within the discretion of the agency. If review is taken, the agency will issue a final decision on the application or remand the application to the adjudicative officer for further proceedings.

Alt. 315.308: (for use by contract appeals board) Reconsideration. Either party may seek reconsideration of the decision on the fee application in accordance with [cross-reference to rule on reconsideration of contract appeals board decisions].

§ 315.309 Judicial review.

Judicial review of final agency decisions on awards may be sought as provided in 5 U.S.C. 504(c)(2).

§ 315.310 Payment of award.

An applicant seeking payment of an award shall submit to the [comptroller or other disbursing official] of the paying agency a copy of the agency's final decision granting the award, accompanied by a certification that the applicant will not seek review of the decision in the United States courts. [Include here address for submissions at specific agency.] The agency will pay the amount awarded to the applicant within 60 days.

Ethics in Government Act and Related Statutes

Citations:

Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified in scattered sections of 2, 5, 18, 28, 39 U.S.C.). The Act was amended June 13, 1979 by Pub. L. No. 96-19, 93 Stat. 37 (technical amendments); June 22, 1979 by Pub. L. No. 96-28, 93 Stat. 76 (amending 18 U.S.C. §207, post-employment restrictions); January 3, 1983 by Pub. L. No. 97-409, 96 Stat. 2039 (amending independent counsel provisions); November 11, 1983 by Pub. L. No. 98-150, 97 Stat. 959 (amending Office of Government Ethics provisions); December 19, 1985 by Pub. L. No. 99-190, 99 Stat. 1325 (amending financial reporting provisions); November 3, 1988 by Pub. L. No. 100-598, 102 Stat. 3031 (reauthorizing and making independent the Office of Government Ethics); November 30, 1989 by Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716 (comprehensive revision); May 4, 1990, Pub. L. No. 101-280, 104 Stat. 149 (technical amendments).

Pub. L. No. 87-849, 76 Stat. 1119 (1962) ("Bribery, Graft, and Conflicts of Interest" codified at 18 U.S.C. §§202-218).

Lead Agencies:

U. S. Office of Government Ethics, Suite 500, 1201 New York Avenue NW, Washington, DC 20005-3917 (202) 523-5757 has overall responsibility for coordinating and ensuring compliance with the government's conflict-of-interest statutes and regulations.

The Office of Government Ethics was given increased independence and expanded powers by its 1988 reauthorization (Pub. L. No. 100-598, 102 Stat. 3031), the Ethics Reform Act of 1989 and Executive Order 12,731. Most significantly, the President has charged the Office of Government Ethics with promulgating, in consultation with the Attorney General and the Office of Personnel Management, regulations that establish "a single, comprehensive, and clear set of executive-branch standards of conduct . . ." (Executive Order 12,731, §201(a)). It also is directed to develop and disseminate an ethics reference manual for the executive branch (Executive Order 12,731, §201(b)). The Order also mandates annual ethics briefings for all presidential appointees, all individuals who are required to file public or nonpublic financial disclosure reports, all contracting officers or procurement officials, and any other employees designated for such training by agency heads; the ethics briefings are to be carried out according to agency ethics training plans that agencies are to develop in coordination with the Office of Government Ethics (Executive Order 12,731, §301(c)).

The Public Integrity Section, Criminal Division, U.S. Department of Justice, 1400 New York Avenue NW, Washington, DC 20005 (202) 514-1412 enforces the criminal conflict-of-interest statutes in conjunction with United States Attorneys.

Overview:

The Ethics in Government Act of 1978 made several major changes to the federal government's system for regulating conflicts of interest: (1) it mandated for the first time public financial disclosure for large numbers of government officers and employees in all three branches of government; (2) it amended 18 U.S.C. §207 to greatly expand executive branch post-government employment restrictions; and (3) it created the U. S. Office of Government Ethics and required all federal agencies to appoint a senior agency employee as their "designated agency ethics official." In addition, the 1978 Act provided authority and procedures for the appointment of independent counsel to investigate certain allegations of illegality by high-level executive branch officials, and created an Office of Senate Legal Counsel. The Ethics in Government Act underwent a major overhaul in 1989 when Congress passed the Ethics Reform Act of 1989. The 1989 amendments affected all facets of federal conflict-of-interest law.

In addition to the public financial disclosure and post-employment restrictions in the Ethics in Government Act of 1978, there are numerous agency-specific or subject matter-specific statutes governing conflicts of interest. This Sourcebook does not comprehensively discuss these statutes, nor does it discuss the current agency standards of conduct regulations promulgated under Executive Order 11,222 or the government-wide standards of conduct regulations to be issued by the Office of Government Ethics under Executive Order 12,731. It focuses instead on public financial disclosure, the government-wide conflict-of-interest provisions in title 18 of the U. S. Code, and the outside activity restrictions in title V of the Ethics in Government Act.

I. Public Financial Disclosure

The Ethics in Government Act of 1978 mandated public financial disclosure by all three branches of government. The executive branch financial disclosure requirements apply to top-level policy officials, nominees to such positions, and to senior career officers and employees. The 1978 Act applied to career officers and employees paid at or above the GS-16 level; however, the Federal Employees Pay Comparability Act of 1990 (Pub. L. No. 101-509) replaced General Schedule positions GS-16 through 18 with a new range of rates for positions classified "above GS-15." The Act's financial reporting requirements were upheld in a lawsuit brought by federal judges, see *Duplantier v. United States*, 606 F.2d 654 (5th Cir. 1979), *cert. denied* 449 U.S. 1076 (1981).

The Ethics Reform Act of 1989 consolidated the public financial disclosure provisions for all three branches of government into a single appendix to title 5 of the U.S. Code (Pub. L. No. 101-194, title II). Office of Government Ethics regulations describing the public financial disclosure requirements are published at 5 CFR Part 734.

Who Must Report? The Act requires reporting by the President and Vice President; all employees whose positions are classified above GS-15, including special government employees who serve more than 60 days in a year; high ranking military officers; administrative law judges; Postal Rate Commission members; Postal Service employees above GS-15; Schedule C confidential or policymaking officials, unless exempted by the Director of the Office of Government Ethics; the Director of OGE and all designated agency ethics officials. The Act also requires reporting by candidates for nomination or election to, and incumbents of, the offices of President or Vice President, and by nominees to and incumbents of offices requiring Senate confirmation.

It is important to note that the Ethics in Government Act did not displace preexisting authority of agencies to require nonpublic financial disclosure statements from employees not covered by the public reporting requirements. In fact, this authority was expressly affirmed in the Ethics Reform Act of 1989 (Pub. L. No. 101-194, §107). OGE regulations require filing nonpublic statements by GS-13 and above employees in certain sensitive areas, such as contracting and grant-making (5 CFR §735.403) and by special government employees, including federal advisory committee members.

What Must Be Reported? The Ethics in Government Act requires a covered federal employee to disclose--

- Value of interest in real or personal property, in a trade or business for investment or production of income that has a fair market value exceeding $1,000; reportable by category of value; excludes report of personal residence, federal retirement benefits, liabilities owed by relatives, and certain savings accounts;

- Earned income exceeding $200; usually requires report of actual amount;

- Investment income exceeding $200; reportable as dividends, rent or royalties, interest, capital gains, trust income, or "other"; reportable by category of amount of income;[1]

- Transactions in real property or securities exceeding $1,000; reportable by category of amount of transaction; excludes report of transaction involving personal residence;

- Gifts; includes gifts of food, lodging, transportation and entertainment, and reimbursements for such expenses; excludes gifts under amounts specified by statute;

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[1] The 1989 amendments provide that a reporting individual need not report the underlying assets of widely-held investment funds if the funds are publicly traded or they are widely diversified and the reporting individual cannot exercise control over the financial interests held by the fund, Pub. L. No. 101-194, §102(f)(8).

- Liabilities exceeding $10,000; excludes home mortgage and certain personal loans;
- Agreements or arrangements for future employment, leaves of absence, continuation of payment by a former employer, or continuing participation in an employee benefit plan; and
- Positions held as an officer, director, trustee, general partner, proprietor, representative, employee, or consultant of any business enterprise, nonprofit organization, or other institution; excludes positions held in religious, social, fraternal or political organizations.

Financial interests of a reporting individual's spouse or minor children are imputed to the employee for reporting purposes, although special rules govern the reporting of those interests.

How Are the Reports Filed and Reviewed? In the executive branch this information is reported on Standard Form 278 ("SF 278"). Most reports are filed with the employee's designated agency ethics official. Members of the military file with the secretary of the service branch that employs them. Except for specified individuals in high-level positions, including those requiring Senate confirmation, agencies are not required to send copies of financial disclosure reports to the Office of Government Ethics. Most review of executive branch financial disclosure reports is done at the agency level. In a typical case, the designated agency ethics official has 60 days after filing to review a report. If the information on the report does not reveal conflicts of interest, the reviewing official signs and dates the report.

The SF 278 also is used by the White House and the Office of Government Ethics to determine whether a nominee for a government position requiring Senate confirmation has property or interests that present conflicts of interest. Most Senate committees will not proceed with confirmation hearings until the Director of the Office of Government Ethics certifies that a nominee's SF 278 has been reviewed and either that no conflicts of interest have been found or arrangements have been made to eliminate them.

A financial disclosure report must be available for public inspection within 30 days after it is received by the agency. (Only reports required by the Ethics in Government Act must be disclosed to the public; confidentiality is the rule for other reports required by OGE or agency regulation.) Persons who request to see financial disclosure reports must give their name, occupation, address, and the identity and address of any other person on whose behalf the request is made, and they must also state that they are aware of the Act's limitations on the use of the information (5 CFR §2634.603(c)).

If a report reveals noncompliance with the ethics laws, the agency reviewing official will advise the reporting individual of the action needed to resolve the problem. Remedial actions are discussed below under "Conflicts of Interest." Individuals who knowingly and willfully file false reports or fail to file are subject to civil penalties of not more than $10,000 and to disciplinary action by the filer's employing agency. A false statement on a financial disclosure report may also subject the filer to a criminal action under 18 U.S.C. §1001. The 1989 amendments also authorize assessment of a $200 penalty for any individual who is more than 30 days late in filing a required report.

II. Conflicts of Interest

Background. Congress consolidated and expanded federal conflict-of-interest laws in 1962. The laws were codified in chapter 11 of title 18 and were again substantially revised by the Ethics Reform Act of 1989.

18 U.S.C. §§203 and 205. These statutes prohibit officers and employees in all three branches of government from representing private individuals before the federal government. Section 203 prohibits an officer or employee from directly or indirectly receiving compensation from a private source for representation before a federal department, agency or court in relation to any particular matter in which the United States is a party or has an interest. Section 205, which is not limited to compensated representation, prohibits an officer or employee from acting as agent or attorney for anyone before any department, agency or court in any such matter. There are limited exceptions to the prohibition.

Prior to the 1989 amendments, these provisions treated employees of the District of Columbia as if they were employees of the federal government, and vice versa. The Ethics Reform Act separated the District of Columbia from the United States for purposes of coverage, except for officers and employees of the U.S. Attorney's Office for the District of Columbia, who are treated as if they are officers and employees of both governments (Pub. L. No. 101-194, title IV, §§402, 404).

18 U.S.C. §207. Restrictions on the post-employment activities of executive branch employees are discussed in detail below in a separate section of this chapter.

18 U.S.C. §208. Section 208 of title 18 is the basic conflict-of-interest statute for the executive branch. Section 208 makes it a crime, punishable by fine or imprisonment, for any executive branch employee to knowingly participate "personally and substantially" in any "particular matter" in which "he, his spouse, minor child, general partner, organization in which he is serving as officer, director, trustee, general partner, or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest."

Section 208, as interpreted by the Department of Justice, covers all particular matters that are the subject of agency action, as long as there is a predictable and direct effect on the employee's financial interests.[2] In July 1991 the Office of Government Ethics, after consultation with the Department of Justice, published proposed Standards of Ethical Conduct for Employees of the Executive Branch (56 Fed. Reg. 33778, 33800-01) that defined "particular matter" as follows:

> The term *particular matter* encompasses only matters that involve deliberation, decision, or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons. Such a matter is covered by this subpart even though it does not involve formal parties and may include governmental action such as legislation or policy making that is narrowly focused on the interests of such a discrete and identifiable class of persons. The term *particular matter*, however, does not extend to the consideration or adoption of broad policy options that are directed to the interests of a large and diverse group of persons. The particular matters covered by this subpart include a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, or arrest.

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[2] U.S. Department of Justice, Office of Legal Counsel, Memorandum for the Solicitor of the Interior 11 (January 12, 1987).

Various options or remedies are available to resolve employee conflicts of interests. These are waivers, recusals, blind trust arrangements, and divestiture of conflicting property. These remedies are discussed in the Office of Government Ethics proposed Standards of Ethical Conduct for Employees of the Executive Branch, Subpart D (56 Fed. Reg. 33778, 33800).

Waivers. Section 208 provides that a waiver may be granted to an officer or employee where the President, agency head or other appointing official issues, in advance, a written decision finding that the employee's financial interest is "not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee." 18 U.S.C. §208(b)(1). Pursuant to Executive Order 12,731, agencies are required to consult with the Office of Government Ethics, where practicable, before granting individual waivers.

Before amendment of section 208 by the Ethics Reform Act of 1989, many agencies exercised their authority under 18 U.S.C. §208(b)(2) to publish general rules exempting certain financial interests that the agencies determined were "too remote or too inconsequential to affect the integrity" of their employees' services. In the Ethics Reform Act of 1989, Congress gave the Office of Government Ethics responsibility for issuing general waivers for the executive branch to promote uniformity in agency waiver decisions (Pub. L. No. 101-194, §405).

Recusals. A violation of 18 U.S.C. §208 can be avoided if an employee "recuses" or disqualifies himself from participating in particular matters that would have a direct and predictable effect on his financial interests or on those that are imputed to him by the statute. The utility of the recusal option depends on the scope of an employee's responsibilities and the nature of his or her holdings. If an employee's financial interests are limited, it may be possible for the employee to function effectively in the office by simply avoiding matters involving those companies or contracts. On the other hand, frequent resort to recusals may greatly impair a government employee's ability to do his or her job.

Blind Trusts. The Ethics in Government Act of 1978 sets forth very specific rules for trust arrangements that will comport with section 208's prohibition on taking action affecting one's financial interests. The Act allows for the establishment of two types of trusts: a "qualified blind trust" and a "qualified diversified blind trust" (5 U.S.C. App. §202(f)). They are described as "qualified" trusts because the Office of Government Ethics is charged with reviewing trusts and trustees and approving them as being in compliance with the requirements of the Act.

The requirements for the establishment of a *qualified diversified blind trust* are much stricter with respect to the type of assets that can be placed in the trust and the types of assets that the trustee can acquire during the duration of the trust. The most important requirement for this type of blind trust is that the trust must have a "well-diversified portfolio" as defined by regulations and approved by the Office of Government Ethics. By contrast, a *qualified blind trust* is one in which the assets placed in trust are gradually "blinded" as the trustee sells conflicting property and reinvests the proceeds in some other property or asset. Assets placed in a qualified blind trust are treated as assets of the government employee for purposes of section 208 until the trustee notifies the employee that the trustee has disposed of the assets.

Divestiture of Conflicting Assets. Divestiture eliminates the need to grant a waiver or to monitor proceedings to determine whether recusal is required, and it avoids the expense and risks associated with blind trust arrangements. Prior to the 1989 amendments, however, the sale of property to remove conflicts of interest was a taxable event, which often was a disincentive to acceptance of government employment. Consistent with Conference Recommendation 88-4, *Deferred Taxation for Conflict-of-Interest Divestitures* (1 CFR §305.88-4), the Ethics Reform Act of 1989 provided for the deferral of federal taxes when property is divested pursuant to a "certificate of divestiture" issued by the President or the Director of the Office of Government Ethics. A certificate of divestiture may not be issued unless it is "reasonably necessary" to comply with any federal conflict-of-interest law (Pub. L. No. 101-194, §502). The Office of Government Ethics issued regulations implementing this authority (5 CFR Part 2634, Subpart J). The regulations include a description of the "permitted" investments into which divested property must be "rolled over" to qualify for the special tax treatment.

Special Government Employees and Advisory Committees. The treatment of part-time government advisers has long been a troublesome issue in federal conflict-of-interest law because these advisers frequently have potentially conflicting, private sector financial interests.

In 1962 Congress created the special category of "special government employee," defined as "an officer or employee of the executive or legislative branch of the United States Government, of any independent agency of the United States or of the District of

Columbia, who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed [130] days during any period of [365] consecutive days, temporary duties either on a full-time or intermittent basis. . . ." 18 U.S.C. §202(a). Special government employees are subject to relaxed restrictions under 18 U.S.C. §§203 and 205, which prohibit federal government employees from representing private individuals before the federal government, and from 18 U.S.C. §209, which prohibits employees from receiving outside compensation for their government work. However, they are not exempted from 18 U.S.C. §208, the basic financial self-dealing prohibition.

The President's Commission on Federal Ethics Law Reform recommended legislation to liberalize granting waivers under 18 U.S.C. §208 for advisory committee members, and Congress incorporated the Commission's recommendation in the Ethics Reform Act of 1989. The Act now allows an agency to certify in writing that the need for an individual's service on an advisory committee "outweighs the potential for a conflict of interest created by the financial interest involved" (Pub. L. No. 101-194, §405).

18 U.S.C. §209. Section 209 prohibits any executive branch officer or employee from accepting supplementation of his or her government salary from a private source, and it prohibits anyone from paying such supplementation of salary. The statute includes several exceptions, including one permitting continued participation in bona fide pension or benefit plan of the employee's previous employer. The U.S. Supreme Court interpreted section 209's application to severance payments from a former private employer in *Crandon v. United States*, 110 S. Ct. 997 (1990) (reversing *United States v. Boeing*, 845 F.2d 476 (4th Cir. 1988)).

18 U.S.C. §216. The Ethics Reform Act added section 216 to authorize civil penalties and injunctive relief, in addition to criminal penalties, for violation of 18 U.S.C. §§203-209.

III. Honoraria and Outside Income and Activities

The Ethics Reform Act of 1989 enacted a provision prohibiting any representative or officer or employee of the government from receiving any honorarium for any speech, appearance or article, excluding travel expenses (Pub. L. No. 101-194, §501(b)). An honorarium that could otherwise be accepted and that does not exceed $2,000 will not be deemed to be received by an employee if paid to an unrelated charitable organization.

The Act also enacted provisions prohibiting representatives and noncareer government officers and employees above GS-15 from earning in any year outside income in excess of 15 percent of the annual rate of basic pay for Level II of the Executive Schedule (Pub. L. No. 101-194, §501(a)). President Bush's Executive Order on Principles of Ethical Conduct for Government Officers and Employees states, however, that no employee appointed by the President to a full-time, noncareer position in the executive branch shall receive any earned income for any outside employment or activity during the appointment (Executive Order 12,731, §102). Representatives and noncareer government officers and employees above GS-15 also are prohibited from affiliating with or being employed by an entity that provides services in a fiduciary relationship and from receiving pay as an officer or member of the board of any entity. In addition, such individuals may not receive compensation for teaching without obtaining prior approval (Pub. L. No. 101-194, §502)).

The Office of Government Ethics has issued interim regulations implementing the honoraria and outside employment and activities provisions (5 CFR Part 2637, 56 Fed. Reg. 1721-1730). It is noted that the prohibition on receipt of honoraria has generated much controversy, especially as it applies to career executive branch employees. In March 1992 the U.S. District Court for the District of Columbia invalidated the ban on constitutional grounds (*National Treasury Employees Union v. U.S.*, U.S. District Court for the District of Columbia, Civ. No. 90-2922, -3027, -3044).

IV. Post-Government Employment Restrictions

Restrictions before the 1989 Amendments. The Ethics in Government Act of 1978 amended 18 U.S.C. §207 to impose four restrictions on the post-employment activities of former executive branch employees. Two of the four provisions applied to all former executive branch employees, and two applied just to former "senior employees." Although significant amendments to section 207 were made by the Ethics Reform Act of 1989 (discussed below), the restrictions enacted in 1978 still apply to employees who terminated their government service before January 1, 1991.

The two post-employment restrictions that applied to all executive branch employees were a lifetime ban and a 2-year ban. The ***lifetime ban*** prohibited any former employee from representing another person on any particular matter involving specific parties, if the matter was one in which the former employee had been involved personally and substantially as a government employee, and in which the United States or District of Columbia governments had an interest. All executive branch employees also were subject to a ***2-year ban*** on representing another person on any particular matter involving specific parties that was pending under their official responsibility in the last year of government service and in which the United States or District of Columbia governments had an interest.

Two post-employment bans applied to senior executive branch officials. The term "senior employee" was defined by 18 U.S.C. §207(d) to include all executive level positions whose pay is fixed according to the Executive Level schedule, all O-9 and above positions in the uniformed services, and those positions designated by the Office of Government Ethics as having "significant decision-making or supervisory responsibility."

Senior employees were subject to a ***2-year ban*** that prohibited them from representing or assisting in the representation of another person ***by personal presence*** on any matter involving specific parties and in which they had participated personally and substantially as government officers or employees. This 2-year ban on senior employee assistance had a tortured history. As originally enacted, this provision prohibited behind-the-scenes advice and assistance on matters covered by the lifetime ban. However, to stanch a threatened exodus of senior government employees before the Act's effective date, Congress amended the provision to contain the "by personal presence" qualifier. This action undermined the original purpose of the provision.

The Ethics in Government Act of 1978 also subjected senior executive branch employees to a ***1-year "cooling-off" period***. The ban prohibited senior employees from representing anyone to the agency in which they served as a senior employee for a period of 1 year after termination of government employment. Only certain matters of a purely personal interest, such as arranging pension matters, were exempted from the coverage of this prohibition. Congress also included in the Ethics in Government Act of 1978 a provision authorizing the Director of the Office of Government Ethics to determine that subagencies or bureaus of large departments were "distinct and separate" for purposes of the cooling-off period.

The 1989 Amendments. Former employees whose government service terminated on or after January 1, 1991, are subject to 18 U.S.C. §207 as amended by the Ethics Reform Act of 1989. That act continues, in a slightly modified form, three of the four preexisting post-employment restrictions: the lifetime ban, the 2-year "under responsibility" ban, and the 1-year cooling-off period for senior employees.[3] Congress accepted the President's Commission on Ethics Law Reform's recommendation to eliminate the largely redundant "by personal presence" ban.

The Ethics Reform Act of 1989 also creates four new restrictions:

> 1. A new 1-year cooling-off ban prohibiting Executive Level I officials, persons paid at Executive Level II in the Executive Office of the President and the Vice President, and certain other appointed officials from making representations to their former agency *or to any individual in the executive branch who occupies any Executive Level position* (18 U.S.C. §207(d), as amended (emphasis added)).
>
> 2. A 1-year cooling-off that applies to the legislative branch. The Act prohibits (1) a former member of Congress from lobbying anyone in the legislative branch; (2) a former elected officer of either house from lobbying the house in which he or she served; (3) a former staff member from lobbying the member (and his staff) who employed him or her; (4) a former committee staff member from lobbying any member or employee of his or her former committee; (5) a former leadership staff member from lobbying the leadership (or staff) of the house in which he or she served; and (6) any former legislative branch agency employee from lobbying his or her former agency (18 U.S.C. §207(e), as amended).
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> 3. A 1-year ban on lobbying on trade or treaty matters. This new provision prohibits a former executive or legislative branch employee from

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[3] The 1-year cooling-off period was revised to grant the Office of Government Ethics new authority to exempt certain classes of employees if the imposition of the restrictions would create unnecessary hardship on an agency in recruiting qualified personnel and the exemption would not create the potential for use of undue influence or advantage. Office of Government Ethics rules implementing this authority are to be published in 5 CFR Part 2641.

> representing or aiding and advising anyone other than the United States with respect to a trade or treaty negotiation if the employee had participated substantially in the negotiation while in government and the employee knew or should have known that information used in aiding or advising was designated as exempt from disclosure under the Freedom of Information Act (18 U.S.C. §207(b), as amended).
>
> 4. A new 1-year ban on lobbying for foreign entities or political parties (as defined in the Foreign Agents Registration Act), which applies to any employee in the executive or legislative branch of government who is subject to a 1-year cooling-off period. These individuals are prohibited from representing the interests of a foreign entity or aiding and advising a foreign entity with the intent to influence a decision of any officer or employee of any department or agency (18 U.S.C. §207(f), as amended).

The Act continues the Office of Government Ethics' authority to designate separate agencies for the purpose of application of the 1-year cooling-off provision, but it denies Executive Level personnel the benefits of such "compartmentalization" decisions and forbids division of the Executive Office of the President (18 U.S.C. §207 (h), as amended). The Ethics Reform Act also continues and revises certain exemptions from the restrictions,[4] and establishes new remedies and penalties for violations of the statute (18 U.S.C. §216).

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[4] There are exceptions for representations on behalf of the United States, state or local governments, institutions of higher education, hospitals and medical research institutions, and international organizations, and exceptions for scientific and technological information and testimony under oath, 18 U.S.C. §207(j), as amended. The Act makes clear that a person may only testify as an expert witness on a matter subject to the lifetime ban if he or she is required to do so by a court order, 18 U.S.C. §207(j)(6), as amended.

Legislative History:

The Ethics Reform Act of 1978. During 1975-76, the Senate considered a number of bills that addressed abuses uncovered during the Watergate period. On July 21, 1976, the Senate passed S. 495, the Watergate Reform Act, by a vote of 91 to 5. Title III of the Act required public financial disclosure by top officials in all three branches of the government. The House of Representatives failed to take action on S. 495 before the 94th Congress adjourned.

On February 1, 1977, Senators Ribicoff and Percy reintroduced the Watergate reform legislation as S. 555 and changed the title to Public Officials Integrity Act of 1977. As introduced, the bill did not contain the public financial disclosure requirement. However, on April 25, 1977, the bill's sponsors introduced Senate Amendment No. 218 to S. 555. Amendment No. 218 not only required public financial disclosure, but it included a requirement that the President appoint an official within the Executive Office of the President to oversee and enforce conflict-of-interest regulation in the executive branch.

In a message to Congress on May 3, 1977, President Carter announced that he was submitting the Ethics in Government Act of 1977. The Administration's bill, introduced as S. 1446 by Senator Ribicoff, called for a three-part program of public financial disclosure, creation of a new Office of Government Ethics in the Civil Service Commission, and greater restrictions on the post-employment activities of former government officials.

The Senate Governmental Affairs Committee held hearings on S. 555, S. 1446, and related legislation on May 3-5, 1977. On May 12, 1977, the Committee reported S. 555, which incorporated major elements of Senate Amendment No. 218 and S. 1446 dealing with financial disclosure. The bill also incorporated the Administration's proposals for the establishment of an Office of Government Ethics and greater restrictions on post-employment activities of former government employees. S. 555 was passed by the Senate on June 27, 1977. Much of the debate involved the bill's provision for appointment of a special prosecutor and the need for an Office of Congressional Legal Counsel; relatively little concern was expressed about the decision to require public financial disclosure by employees in all three branches of the government.

Action on conflict-of-interest legislation was more drawn out and complicated in the House, primarily because the bill was referred to four committees for consideration. On June 16 and 23, 1977, the House Committee on Post Office and Civil Service, Subcommittee on Employee Ethics and Utilization, held hearings on the Administration's bill, H.R. 6954, and two other reform proposals. On September 28, 1977, the Committee reported H.R. 6954, amended to extend financial disclosure to certain employees below the GS-16 grade level and to establish a centralized corps of ethics counselors to oversee implementation of conflict-of-interest regulation in the executive branch.

On September 9 and 12, 1977, the Subcommittee on Administrative Law and Governmental Relations of the House Judiciary Committee held hearings on H.R. 6954 and H.R. 1, a reform bill that had been introduced in the House on January 4, 1977. The hearings were preceded by release of a final GAO report that evaluated the existing confidential financial disclosure system. The GAO testimony highlighted the need to balance the public's right to know and the federal employee's privacy interests. On November 2, 1977, H.R. 1 was reported to the House over the strong dissent of some members who were concerned about the expanded post-employment restrictions in the bill.

On August 5, 1977, the House Select Committee on Ethics reported H.R. 7401 which, because of the limits of the Committee's jurisdiction, dealt only with the bill's provisions affecting the legislative branch. The House Armed Services Committee was the last of the House committees to take action on H.R. 6954. Though it patterned its version of H.R. 6954 after the Post Office and Civil Service Committee bill, the Armed Services Committee bill exempted military personnel from public financial disclosure. The House was unable to take action on the four differing bills before the end of the session.

Rules and other controversies involving the legislation delayed House consideration until September 1978. Finally, on September 27, a new compromise version of the Ethics in Government Act, H.R. 13850, reached the House floor. The debate focused on the issues that had surfaced during committee consideration of H.R. 6954, namely the scope of the post-employment restrictions, the administrative apparatus for administering the executive branch ethics program, and the applicability of public financial disclosure to civilian and military personnel.

On September 30, 1978, the House passed the Ethics in Government Act of 1978, which contained the key features of the Administration's proposal. Although there were differences, the Senate and House bills were easily reconciled in conference. The Senate approved the conference report on October 7, 1978, and the

House followed suit on October 12. President Carter signed the legislation on October 26, 1978.

The Ethics Reform Act of 1989. Senator Strom Thurmond introduced S. 237, the Integrity in Post Employment Act, in the 100th Congress in response to reported post-employment abuses. As reported by the Senate Judiciary Committee in July 1987, the Thurmond bill established an 18-month moratorium for domestic matters, and a 3-year moratorium for foreign matters, during which a former high-level official could not work for, advise, or represent anyone for compensation before any part of the federal government on any matter. Despite criticism, a pared-down bill was passed by the Senate on April 19.

Attention then focused on the House of Representatives, and particularly on Representative Barney Frank of Massachusetts, Chairman of the Subcommittee on Administrative Law and Governmental Relations of the House Judiciary Committee, who had promised to introduce a post-employment bill if the Senate acted. Frank introduced H.R. 4917, and the House leadership thereafter committed itself to passage of new restrictions on post-government employment lobbying.

On October 21, 1988, Congress passed a revised bill, H.R. 5043, the Post-Employment Restrictions Act of 1988. H.R. 5043 broadened section 207's lifetime ban on participation in specific matters in which a former executive branch officer or employee worked while in government to include knowingly aiding and advising as well as representation. But perhaps the most sweeping aspect of H.R. 5043 was its "cooling-off" provisions, which modified the rules applicable to the executive branch and, for the first time, extended post-employment restrictions to the legislative branch.

Passage of H.R. 5043, an "ethics bill," appeared almost certain in an election year. However, President Reagan "pocket-vetoed" H.R. 5043 after receiving criticism of the bill from numerous department and agency heads, including the Office of Government Ethics and the Department of Justice.[5] The President characterized the bill as "flawed, excessive, and discriminatory" and said it "would discourage from Government service America's best talent" (Presidential Memorandum of Disapproval, November 23, 1988).

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[5] See "Aide Says Reagan is Urged to Veto Limits on Lobbying," The New York Times, A16 (Nov. 22, 1988); Phillips, "Ethics Bill Pocket-Veto Urged," The Washington Post, A1 (Nov. 22, 1988); and Cannon, "President Plans to Veto Stricter Ethics Rules," The Washington Post, A1 (Nov. 23, 1988).

President Reagan also concluded that the bill "unreasonably favors the Congress with restrictions lighter than those that would apply to the Executive branch."

To underscore his commitment to ethical standards, President Bush established the Commission on Federal Ethics Law Reform in his first week in office. Malcolm R. Wilkey, former federal court of appeals judge, was selected to chair the commission, and former Attorney General Griffin B. Bell served as vice chairman. The Commission met for the first time on January 27, 1989 and issued its final report on March 9, 1989.[6] About a month later the President sent to Congress his Government-Wide Ethics Act of 1989.

Meanwhile, House and Senate sponsors of post-employment restrictions in the 100th Congress reintroduced comparable bills in the 101st Congress. Representative Barney Frank introduced H.R. 9, the Post-Employment Restrictions Act, on January 3, 1989. H.R. 9 tracked H.R. 5043 with one significant exception: the lifetime ban on aiding and advising clients in certain matters a former employee had worked on was changed to a 2-year ban on aiding and advising, thus bringing it into line with the bill that had passed the Senate in the 100th Congress. H.R. 9 subsequently was renumbered H.R. 2267, and hearings on the bill were held in June 1989.

Senator Thurmond introduced S. 1, the "Integrity in Post Employment Act of 1989," on January 25, 1989. The post-employment provisions of S. 1 generally tracked S. 237, the bill passed by the Senate in the 100th Congress. However, S. 1 was subsequently superseded by S. 765, the Bush Administration's Government-Wide Ethics Act of 1989, which Senator Thurmond introduced on April 12. The President's bill was introduced in the House by Representative Lamar Smith as H.R. 2337.

President Bush's proposed post-employment restrictions, which were generally consistent with the recommendations of his Commission on Federal Ethics Law Reform, provided for: (1) extension of the lifetime ban on representation in matters involving specific parties in which the employee worked to the judiciary, but not to the legislative branch; extension of the executive branch 2-year "under responsibility" ban to those parts of the legislative branch that are not routinely engaged in formulating legislation (e.g., the General Accounting Office, the Congressional

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[6] To Serve With Honor: Report of the President's Commission on Federal Ethics Law Reform (March 1989).

Budget Office), but not to the judicial branch; (3) extension of the 1-year cooling-off period to members of Congress, judges, and senior employees of the legislative and judicial branches; (4) elimination of the authority to compartmentalize the Executive Office of the President, and granting such authority to the legislative branch; and (5) establishing a new 2-year ban for the executive and legislative branches, but not the judicial branch, on the unauthorized use or disclosure of designated nonpublic information.

In the area of financial disclosure the Bush legislative package was even more stringent than the President's Commission on Federal Ethics Law Reform. The President's Government-Wide Ethics Act of 1989 would have replaced the current system of reporting by value category with reporting of the actual value of each asset and source of income rounded to the nearest thousand dollars. Where the actual value was unknown or not easily determined, a good faith estimate could be given and, in the case of stock, the number of shares could be reported in lieu of the dollar amount. Congress, however, retained the value reporting category approach in the Ethics Reform Act of 1989.

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Ethics in Government Act and Related Statutes

Title 5, U.S. Code

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§103. Filing of reports.
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§106. Review of reports.
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[Title III-Repealed]

§101. Persons required to file

(a) Within thirty days of assuming the position of an officer or employee described in subsection (f), an individual shall file a report containing the information described in section 102(b) unless the individual has left another position described in subsection (f) within thirty days prior to assuming such new position or has already filed a report under this title with respect to nomination for the new position or as a candidate for the position.

(b)(1) Within five days of the transmittal by the President to the Senate of the nomination of an individual (other than an individual nominated for appointment to a position as a Foreign Service Officer or a grade or rank in the uniformed services for which the pay grade prescribed by section 201 of title 37, United States Code, is O-6 or below) to a position, appointment to which requires the advice and consent of the Senate, such individual shall file a report containing the information described in section 102(b). Such individual shall, not later than the date of the first hearing to consider the nomination of such individual, make current the report filed pursuant to this paragraph by filing the information required by section 102(a)(1)(A) with respect to income and honoraria received as of the date which occurs five days before the date of such hearing. Nothing in this Act shall prevent any Congressional committee from requesting, as a condition of confirmation, any additional financial information from any Presidential nominee whose nomination has been referred to that committee.

(2) An individual whom the President or the President-elect has publicly announced he intends to nominate to a position may file the report required by paragraph (1) at any time after that public announcement, but not later than is required under the first sentence of such paragraph.

(c) Within thirty days of becoming a candidate as defined in section 301 of the Federal Campaign Act of 1971, in a calendar year for nomination or election to the office of President, Vice President, or Member of Congress, or on or before May 15 of that calendar year, whichever is later, but in no event later than 30 days before the election, and on or before May 15 of each successive year an individual continues to be a candidate, an individual other than an incumbent President, Vice President, or Member of Congress shall file a report containing the information described in section 102(b). Notwithstanding the preceding sentence, in any calendar year in which an individual continues to be a candidate for any office but all elections for such office relating to such candidacy were held in prior calendar years, such individual need not file a report unless he becomes a candidate for another vacancy in that office or another office during that year.

(d) Any individual who is an officer or employee described in subsection (f) during any calendar year and performs the duties of his position or office for a period in excess of sixty days in that calendar year shall file on or before May 15 of the succeeding year a report containing the information described in section 102(a).

(e) Any individual who occupies a position described in subsection (f) shall, on or before the thirtieth day after termination of employment in such position, file a report containing the information described in section 102(a) covering the preceding calendar year if the report required by subsection (d) has not been filed and covering the portion of the calendar year in which such termination occurs up to the date the individual left such office or position, unless such individual has accepted employment in another position described in subsection (f).

(f) The officers and employees referred to in subsections (a), (d), and (e) are-

(1) the President;

(2) the Vice President;

(3) each officer or employee in the executive branch, including a special Government employee as defined in section 202 of title 18, United States Code, whose position is classified at GS-16 or above of the General Schedule prescribed by section 5332 of title 5, United States Code, or the rate of basic pay for which is fixed (other than under the General Schedule) at a rate equal to or greater than the minimum rate of basic pay fixed for GS-16; each member of a uniformed service whose pay grade is at or in excess of O-7 under section 201 of title 37, United States Code; and each officer or employee in any other position determined by the Director of the Office of Government Ethics to be of equal classification;

(4) each employee appointed pursuant to section 3105 of title 5, United States Code;

(5) any employee not described in paragraph (3) who is in a position in the executive branch which is excepted from the competitive service by reason of being of a confidential or policymaking character, except that the Director of the Office of Government Ethics may, by regulation, exclude from the application of this paragraph any individual, or group of individuals, who are in such positions, but only in cases in which the Director determines such exclusion would not affect adversely the integrity of the Government or the public's confidence in the integrity of the Government;

(6) the Postmaster General, the Deputy Postmaster General, each Governor of the Board of Governors of the United States Postal Service and each officer or employee of the United States Postal Service or Postal Rate Commission whose

basic rate of pay is equal to or greater than the minimum rate of basic pay fixed for GS-16;

(7) the Director of the Office of Government Ethics and each designated agency ethics official;

(8) any civilian employee not described in paragraph (3), employed in the Executive Office of the President (other than a special government employee) who holds a commission of appointment from the President;

(9) a Member of Congress as defined under section 109(12);

(10) an officer or employee of the Congress as defined under section 109(13);

(11) a judicial officer as defined under section 109(10); and

(12) a judicial employee as defined under section 109(8).

(g)(1) Reasonable extensions of time for filing any report may be granted under procedures prescribed by the supervising ethics office for each branch, but the total of such extensions shall not exceed ninety days.

(2)(A) In the case of an individual who is serving in the Armed Forces, or serving in support of the Armed Forces, in an area while that area is designated by the President by Executive order as a combat zone for purposes of section 112 of the Internal Revenue Code of 1986, the date for the filing of any report shall be extended so that the date is 180 days after the later of-

(i) the last day of the individual's service in such area during such designated period; or

(ii) the last day of the individual's hospitalization as a result of injury received or disease contracted while serving in such area.

(B) The Office of Government Ethics, in consultation with the Secretary of Defense, may prescribe procedures under this paragraph.

(h) The provisions of subsections (a), (b), and (e) shall not apply to an individual who, as determined by the designated agency ethics official or Secretary concerned (or in the case of a Presidential appointee under subsection (b), the Director of the Office of Government Ethics), the congressional ethics committees, or the Judicial Conference, is not reasonably expected to perform the duties of his office or position for more than sixty days in a calendar year, except that if such individual performs the duties of his office or position for more than sixty days in a calendar year-

(1) the report required by subsections (a) and (b) shall be filed within fifteen days of the sixtieth day, and

(2) the report required by subsection (e) shall be filed as provided in such subsection.

(i) The supervising ethics office for each branch may grant a publicly available request for a waiver of any reporting requirement under this section for an individual who is expected to perform or has performed the duties of his office or position less than one hundred and thirty days in a calendar year, but only if the supervising ethics office determines that-

(1) such individual is not a full-time employee of the Government,

(2) such individual is able to provide services specially needed by the Government,

(3) it is unlikely that the individual's outside employment or financial interests will create a conflict of interest, and

(4) public financial disclosure by such individual is not necessary in the circumstances.

(Pub. L. No. 95-521, title I, §101, Oct. 26, 1978, 92 Stat. 1824; Pub. L. No. 96-19, §§2(a)(1), (b), (c)(1), 4(b)(1), (d)-(f), 5, June 13, 1979, 93 Stat. 37, 38, 40; Pub. L. No. 101-194, title II, §202, Nov. 30, 1989, 103 Stat. 1725; Pub. L. No. 101-280, §3(1), (2), May 4, 1990, 104 Stat. 152; Pub. L. No. 102-25, title VI, §605(a), Apr. 6, 1991, 105 Stat. 110.)

§102. Contents of reports

(a) Each report filed pursuant to section 101(d) and (e) shall include a full and complete statement with respect to the following:

(1)(A) The source, type, and amount or value of income (other than income referred to in subparagraph (B)) from any source (other than from current employment by the United States Government), and the source, date, and amount of honoraria from any source, received during the preceding calendar year, aggregating $200 or more in value and, effective January 1, 1991, the source, date, and amount of payments made to charitable organizations in lieu of honoraria, and the reporting individual shall simultaneously file with the applicable supervising ethics office, on a confidential basis, a corresponding list of recipients of all such payments, together with the dates and amounts of such payments.

(B) The source and type of income which consists of dividends, rents, interest, and capital gains, received during the preceding calendar year which exceeds $200 in amount or value, and an indication of which of the following categories the amount or value of such item of income is within:

(i) not more than $1,000,
(ii) greater than $1,000 but not more than $2,500,
(iii) greater than $2,500 but not more than $5,000,
(iv) greater than $5,000 but not more than $15,000,
(v) greater than $15,000 but not more than $50,000,
(vi) greater than $50,000 but not more than $100,000,
(vii) greater than $100,000 but not more than $1,000,000, or
(viii) greater than $1,000,000.

(2)(A) The identity of the source, a brief description, and the value of all gifts aggregating more than the minimal value as established by section 7342(a)(5) of title 5, United States Code, or $250, whichever is greater, received from any source other than a relative of the reporting individual during the preceding calendar year, except that any food, lodging, or entertainment received as personal hospitality of an individual need not be reported, and any gift with a fair market value of $100 or less, as adjusted at the same time and by the same percentage as the minimal value is adjusted, need not be aggregated for purposes of this subparagraph.

(B) The identity of the source and a brief description (including a travel itinerary, dates, and nature of expenses provided) of reimbursements received from any source aggregating more than the minimal value as established by section 7342(a)(5) of title 5, United States Code, or $250, whichever is greater and received during the preceding calendar year.

(C) In an unusual case, a gift need not be aggregated under subparagraph (A) if a publicly available request for a waiver is granted.

(3) The identity and category of value of any interest in property held during the preceding calendar year in a trade or business, or for investment or the production of income, which has a fair market value which exceeds $1,000 as of the close of the preceding calendar year, excluding any personal liability owed to the reporting individual by a spouse, or by a parent, brother, sister, or child of the reporting individual or of the reporting individual's spouse, or any deposits aggregating $5,000 or less in a personal savings account. For purposes of this paragraph, a personal savings account shall include any certificate of deposit or any other form of deposit in a bank, savings and loan association, credit union, or similar financial institution.

(4) The identity and category of value of the total liabilities owed to any creditor other than a spouse, or a parent, brother, sister, or child of the reporting individual or of the reporting individual's spouse which exceed $10,000 at any time during the preceding calendar year, excluding-

(A) any mortgage secured by real property which is a personal residence of the reporting individual or his spouse; and

(B) any loan secured by a personal motor vehicle, household furniture, or appliances, which loan does not exceed the purchase price of the item which secures it.

With respect to revolving charge accounts, only those with an outstanding liability which exceeds $10,000 as of the close of the preceding calendar year need be reported under this paragraph.

(5) Except as provided in this paragraph, a brief description, the date, and category of value of any purchase, sale or exchange during the preceding calendar year which exceeds $1,000-

(A) in real property, other than property used solely as a personal residence of the reporting individual or his spouse; or

(B) in stocks, bonds, commodities futures, and other forms of securities.

Reporting is not required under this paragraph of any transaction solely by and between the reporting individual, his spouse, or dependent children.

(6)(A) The identity of all positions held on or before the date of filing during the current calendar year (and, for the first report filed by an individual, during the two-year period preceding such calendar year) as an officer, director, trustee, partner, proprietor, representative, employee, or consultant of any corporation, company, firm, partnership, or other business enterprise, any nonprofit organization, any labor organization, or any educational or other institution other than the United States. This subparagraph shall not require the reporting of positions held in any religious, social, fraternal, or political entity and positions solely of an honorary nature.

(B) If any person, other than the United States Government, paid a nonelected reporting individual compensation in excess of $5,000 in any of the two calendar years prior to the calendar year during which the individual files his first report under this title, the individual shall include in the report-

(i) the identity of each source of such compensation; and

(ii) a brief description of the nature of the duties performed or services rendered by the reporting individual for each such source.

The preceding sentence shall not require any individual to include in such report any information which is considered confidential as a result of a privileged relationship, established by law, between such individual and any person nor shall it require an individual to report any information with respect to any person for whom services were provided by any firm or association of which such individual was a member, partner, or employee unless such individual was directly involved in the provision of such services.

(7) A description of the date, parties to, and terms of any agreement or arrangement with respect to (A) future employment; (B) a leave of absence during the period of the reporting individual's Government service; (C) continuation of payments by a former employer other than the United States Government; and (D) continuing participation in an employee welfare or benefit plan maintained by a former employer.

(b)(1) Each report filed pursuant to subsections (a), (b), and (c) of section 101 shall include a full and complete statement with respect to the information required by-

(A) paragraph (1) of subsection (a) for the year of filing and the preceding calendar year,

(B) paragraphs (3) and (4) of subsection (a) as of the date specified in the report but which is less than thirty-one days before the filing date, and

(C) paragraphs (6) and (7) of subsection (a) as of the filing date but for periods described in such paragraphs.

(2)(A) In lieu of filling out one or more schedules of a financial disclosure form, an individual may supply the required information in an alternative format, pursuant to either rules adopted by the supervising ethics office for the branch in which such individual serves or pursuant to a specific written determination by such office for a reporting individual.

(B) In lieu of indicating the category of amount or value of any item contained in any report filed under this title, a reporting individual may indicate the exact dollar amount of such item.

(c) In the case of any individual described in section 101(e), any reference to the preceding calendar year shall be considered also to include that part of the calendar year of filing up to the date of the termination of employment.

(d)(1) The categories for reporting the amount or value of the items covered in paragraphs (3), (4), and (5) of subsection (a) are as follows:

(A) not more than $15,000;
(B) greater than $15,000 but not more than $50,000;
(C) greater than $50,000 but not more than $100,000;
(D) greater than $100,000 but not more than $250,000;
(E) greater than $250,000 but not more than $500,000;
(F) greater than $500,000 but not more than $1,000,000; and
(G) greater than $1,000,000.

(2) For the purposes of paragraph (3) of subsection (a) if the current value of an interest in real property (or an interest in a real estate partnership) is not ascertainable without an appraisal, an individual may list (A) the date of purchase and the purchase price of the interest in the real property, or (B) the assessed value of the real property for tax purposes, adjusted to reflect the market value of the property used for the assessment if the assessed value is computed at less than 100 percent of such market value, but such individual shall include in his report a full and complete description of the method used to determine such assessed value, instead of specifying a category of value pursuant to paragraph (1) of this subsection. If the current value of any other item required to be reported under

paragraph (3) of subsection (a) is not ascertainable without an appraisal, such individual may list the book value of a corporation whose stock is not publicly traded, the net worth of a business partnership, the equity value of an individually owned business, or with respect to other holdings, any recognized indication of value, but such individual shall include in his report a full and complete description of the method used in determining such value. In lieu of any value referred to in the preceding sentence, an individual may list the assessed value of the item for tax purposes, adjusted to reflect the market value of the item used for the assessment if the assessed value is computed at less than 100 percent of such market value, but a full and complete description of the method used in determining such assessed value shall be included in the report.

(e)(1) Except as provided in the last sentence of this paragraph, each report required by section 101 shall also contain information listed in paragraphs (1) through (5) of subsection (a) of this section respecting the spouse or dependent child of the reporting individual as follows:

(A) The source of items of earned income earned by a spouse from any person which exceed $1,000 and the source and amount of any honoraria received by a spouse, except that, with respect to earned income (other than honoraria), if the spouse is self-employed in business or a profession, only the nature of such business or profession need be reported.

(B) All information required to be reported in subsection (a)(1)(B) with respect to income derived by a spouse or dependent child from any asset held by the spouse or dependent child and reported pursuant to subsection (a)(3).

(C) In the case of any gifts received by a spouse or dependent child which are not received totally independent of the relationship of the spouse or dependent child to the reporting individual, the identity of the source and a brief description of gifts of transportation, lodging, food, or entertainment and a brief description and the value of other gifts.

(D) In the case of any reimbursements received by a spouse or dependent child which are not received totally independent of the relationship of the spouse or dependent child to the reporting individual, the identity of the source and a brief description of each such reimbursement.

(E) In the case of items described in paragraphs (3) through (5) of subsection (a), all information required to be reported under these paragraphs other than items (i) which the reporting individual certifies represent the spouse's or dependent child's sole financial interest or responsibility and which the reporting individual has no knowledge of, (ii) which are not in any way, past or present, derived from the income, assets, or activities of the reporting individual, and (iii) from which the reporting individual neither derives, nor expects to derive, any financial or economic benefit.

Reports required by subsections (a), (b), and (c) of section 101 shall, with respect to the spouse and dependent child of the reporting individual, only contain information listed in paragraphs (1), (3), and (4) of subsection (a), as specified in this paragraph.

(2) No report shall be required with respect to a spouse living separate and apart from the reporting individual with the intention of terminating the marriage or providing for permanent separation; or with respect to any income or obligations of an individual arising from the dissolution of his marriage or the permanent separation from his spouse.

(f)(1) Except as provided in paragraph (2), each reporting individual shall report the information required to be reported pursuant to subsections (a), (b), and (c) of this section with respect to the holdings of and the income from a trust or other financial arrangement from which income is received by, or with respect to which a beneficial interest in principal or income is held by, such individual, his spouse, or any dependent child.

(2) A reporting individual need not report the holdings of or the source of income from any of the holdings of-

(A) any qualified blind trust (as defined in paragraph (3));

(B) a trust-

(i) which was not created directly by such individual, his spouse, or any dependent child, and

(ii) the holdings or sources of income of which such individual, his spouse, and any dependent child have no knowledge of; or

(C) an entity described under the provisions of paragraph (8), but such individual shall report the category of the amount of income received by him, his spouse, or any dependent child from the trust or other entity under subsection (a)(1)(B) of this section.

(3) For purposes of this subsection, the term "qualified blind trust" includes any trust in which a reporting individual, his spouse, or any minor or dependent child has a beneficial interest in the principal or income, and which meets the following requirements:

(A)(i) The trustee of the trust and any other entity designated in the trust instrument to perform fiduciary duties is a financial institution, an attorney, a certified public accountant, a broker, or an investment advisor who-

(I) is independent of and not associated with any interested party so that the trustee or other person cannot be controlled or influenced in the administration of the trust by any interested party; and

(II) is not and has not been an employee of or affiliated with any interested party and is not a partner of, or involved in any joint venture or other investment with, any interested party; and

(III) is not a relative of any interested party.

(ii) Any officer or employee of a trustee or other entity who is involved in the management or control of the trust-

(I) is independent of and not associated with any interested party so that such officer or employee cannot be controlled or influenced in the administration of the trust by any interested party;

(II) is not a partner of, or involved in any joint venture or other investment with, any interested party; and

(III) is not a relative of any interested party.

(B) Any asset transferred to the trust by an interested party is free of any restriction with respect to its transfer or sale unless such restriction is expressly approved by the supervising ethics office of the reporting individual.

(C) The trust instrument which establishes the trust provides that-

(i) except to the extent provided in subparagraph (B) of this paragraph, the trustee in the exercise of his authority and discretion to manage and control the assets of the trust shall not consult or notify any interested party;

(ii) the trust shall not contain any asset the holding of which by an interested party is prohibited by any law or regulation;

(iii) the trustee shall promptly notify the reporting individual and his supervising ethics office when the holdings of any particular asset transferred to the trust by any interested party are disposed of or when the value of such holding is less than $1,000;

(iv) the trust tax return shall be prepared by the trustee or his designee, and such return and any information relating thereto (other than the trust income summarized in appropriate categories necessary to complete an interested party's tax return), shall not be disclosed to any interested party;

(v) an interested party shall not receive any report on the holdings and sources of income of the trust, except a report at the end of each calendar quarter with respect to the total cash value of the interest of the interested party in the trust or the net income or loss of the trust or any reports necessary to enable the interested party to complete an individual tax return required by law or to provide the information required by subsection (a)(1) of this section, but such report shall not identify any asset or holding;

(vi) except for communications which solely consist of requests for distributions of cash or other unspecified assets of the trust, there shall be no direct or indirect communication between the trustee and an interested party with respect to the trust unless such communication is in writing and unless it relates only (I) to the general financial interest and needs of the interested party (including, but not limited to, an interest in maximizing income or long-term capital gain), (II) to the notification of the trustee of a law or regulation subsequently applicable to the reporting individual which prohibits the interested party from holding an asset, which notification directs that the asset not be held by the trust, or (III) to directions to the trustee to sell all of an asset initially placed in the trust by an interested party which in the determination of the reporting individual creates a conflict of interest or the appearance thereof due to the subsequent assumption of duties by the reporting individual (but nothing herein shall require any such direction); and

(vii) the interested parties shall make no effort to obtain information with respect to the holdings of the trust, including obtaining a copy of any trust tax return filed or any information relating thereto except as otherwise provided in this subsection.

(D) The proposed trust instrument and the proposed trustee is approved by the reporting individual's supervising ethics office.

(E) For purposes of this subsection, "interested party" means a reporting individual, his spouse, and any minor or dependent child; "broker" has the meaning set forth in section 3(a)(4) of the Securities and Exchange Act of 1934 (15 U.S.C. 78c(a)(4)); and "investment adviser" includes any investment adviser who, as determined under regulations prescribed by the supervising ethics office, is generally involved in his role as such an adviser in the management or control of trusts.

(F) Any trust qualified by a supervising ethics office before the effective date of title II of the Ethics Reform Act of 1989 shall continue to be governed by the law and regulations in effect immediately before such effective date.

(4)(A) An asset placed in a trust by an interested party shall be considered a financial interest of the reporting individual, for the purposes of any applicable conflict of interest statutes, regulations, or rules of the Federal Government (including section 208 of title 18, United States Code), until such time as the reporting individual is notified by the trustee that such asset has been disposed of, or has a value of less than $1,000.

(B)(i) The provisions of subparagraph (A) shall not apply with respect to a trust created for the benefit of a reporting individual, or the spouse, dependent child, or minor child of such a person, if the supervising ethics office for such reporting individual finds that-

(I) the assets placed in the trust consist of a well-diversified portfolio of readily marketable securities;

(II) none of the assets consist of securities of entities having substantial activities in the area of the reporting individual's primary area of responsibility;

(III) the trust instrument prohibits the trustee, notwithstanding the provisions of paragraphs (3)(C)(iii) and (iv) of this subsection, from making public or informing any interested party of the sale of any securities;

(IV) the trustee is given power of attorney, notwithstanding the provisions of paragraph (3)(C)(v) of this subsection, to prepare on behalf of any interested party the personal income tax returns and similar returns which may contain information relating to the trust; and

(V) except as otherwise provided in this paragraph, the trust instrument provides (or in the case of a trust established prior to the effective date of this Act which by its terms does not permit amendment, the trustee, the reporting individual, and any other interested party agree in writing) that the trust shall be administered in accordance with the requirements of this subsection and the trustee of such trust meets the requirements of paragraph (3)(A).

(ii) In any instance covered by subparagraph (B) in which the reporting individual is an individual whose nomination is being considered by a congressional committee, the reporting individual shall inform the congressional committee considering his nomination before or during the period of such individual's confirmation hearing of his intention to comply with this paragraph.

(5)(A) The reporting individual shall, within thirty days after a qualified blind trust is approved by his supervising ethics office, file with such office a copy of-

(i) the executed trust instrument of such trust (other than those provisions which relate to the testamentary disposition of the trust assets), and

(ii) a list of the assets which were transferred to such trust, including the category of value of each asset as determined under subsection (d) of this section.

This subparagraph shall not apply with respect to a trust meeting the requirements for being considered a qualified blind trust under paragraph (7) of this subsection.

(B) The reporting individual shall, within thirty days of transferring an asset (other than cash) to a previously established qualified blind trust, notify his supervising ethics office of the identity of each such asset and the category of value of each asset as determined under subsection (d) of this section.

(C) Within thirty days of the dissolution of a qualified blind trust, a reporting individual shall-

(i) notify his supervising ethics office of such dissolution, and

(ii) file with such office a copy of a list of the assets of the trust at the time of such dissolution and the category of value under subsection (d) of this section of each such asset.

(D) Documents filed under subparagraphs (A), (B), and (C) of this paragraph and the lists provided by the trustee of assets placed in the trust by an interested party which have been sold shall be made available to the public in the same manner as a report is made available under section 105 and the provisions of that section shall apply with respect to such documents and lists.

(E) A copy of each written communication with respect to the trust under paragraph (3)(C)(vi) shall be filed by the person initiating the communication with the reporting individual's supervising ethics office within five days of the date of the communication.

(6)(A) A trustee of a qualified blind trust shall not knowingly and willfully, or negligently, (i) disclose any information to an interested party with respect to such trust that may not be disclosed under paragraph (3) of this subsection; (ii) acquire any holding the ownership of which is prohibited by the trust instrument; (iii) solicit advice from any interested party with respect to such trust, which solicitation is prohibited by paragraph (3) of this subsection or the trust agreement; or (iv) fail to file any document required by this subsection.

(B) A reporting individual shall not knowingly and willfully, or negligently, (i) solicit or receive any information with respect to a qualified blind trust of which he is an interested party that may not be disclosed under paragraph (3)(C) of this subsection or (ii) fail to file any document required by this subsection.

(C)(i) The Attorney General may bring a civil action in any appropriate United States district court against any individual who knowingly and willfully violates the provisions of subparagraph (A) or (B) of this paragraph. The court in which such action is brought may assess against such individual a civil penalty in any amount not to exceed $10,000.

(ii) The Attorney General may bring a civil action in any appropriate United States district court against any individual who negligently violates the provisions of subparagraph (A) or (B) of this paragraph. The court in which such action is brought may assess against such individual a civil penalty in any amount not to exceed $5,000.

(7) Any trust may be considered to be a qualified blind trust if-

(A) the trust instrument is amended to comply with the requirements of paragraph (3) or, in the case of a trust instrument which does not by its terms permit amendment, the trustee, the reporting individual, and any other interested party agree in writing that the trust shall be administered in accordance with the requirements of this subsection and the trustee of such trust meets the requirements of paragraph (3)(A); except that in the case of any interested party who is a dependent child, a parent or guardian of such child may execute the agreement referred to in this subparagraph;

(B) a copy of the trust instrument (except testamentary provisions) and a copy of the agreement referred to in subparagraph (A), and a list of the assets held by the trust at the time of approval by the supervising ethics office, including the category of value of each asset as determined under subsection

(d) of this section, are filed with such office and made available to the public as provided under paragraph (5)(D) of this subsection; and

(C) the supervising ethics office determines that approval of the trust arrangement as a qualified blind trust is in the particular case appropriate to assure compliance with applicable laws and regulations.

(8) A reporting individual shall not be required to report the financial interests held by a widely held investment fund (whether such fund is a mutual fund, regulated investment company, pension or deferred compensation plan, or other investment fund), if-

(A)(i) the fund is publicly traded; or

(ii) the assets of the fund are widely diversified; and

(B) the reporting individual neither exercises control over nor has the ability to exercise control over the financial interests held by the fund.

(g) Political campaign funds, including campaign receipts and expenditures, need not be included in any report filed pursuant to this title.

(h) A report filed pursuant to subsection (a), (d), or (e) of section 101 need not contain the information described in subparagraphs (A), (B), and (C) of subsection (a)(2) with respect to gifts and reimbursements received in a period when the reporting individual was not an officer or employee of the Federal Government.

(i) A reporting individual shall not be required under this title to report-

(1) financial interests in or income derived from-

(A) any retirement system under title 5, United States Code (including the Thrift Savings Plan under subchapter III of chapter 84 of such title); or

(B) any other retirement system maintained by the United States for officers or employees of the United States, including the President, or for members of the uniformed services; or

(2) benefits received under the Social Security Act [42 U.S.C. 301 et seq.].

(Pub. L. No. 95-521, title I, §102, Oct. 26, 1978, 92 Stat. 1825; Pub. L. No. 96-19, §§3(a)(1), (b), 6(a), 7(a)-(d)(1), (f), 9(b), (c)(1), (j), June 13, 1979, 93 Stat. 39-43; Pub. L. No. 97-51, §130(b), Oct. 1, 1981, 95 Stat. 966; Pub. L. No. 98-150, §10, Nov. 11, 1983, 97 Stat. 962; Pub. L. No. 101-194, title II, §202, Nov. 30, 1989, 103 Stat. 1727; Pub. L. No. 101-280, §3(3), May 4, 1990, 104 Stat. 152; Pub. L. No. 102-90, title III, §314(a), Aug. 14, 1991, 105 Stat. 469.)

§103. Filing of reports

(a) Except as otherwise provided in this section, the reports required under this title shall be filed by the reporting individual with the designated agency ethics official at the agency by which he is employed (or in the case of an individual described in section 101(e), was employed) or in which he will serve. The date any report is received (and the date of receipt of any supplemental report) shall be noted on such report by such official.

(b) The President, the Vice President, and independent counsel and persons appointed by independent counsel under chapter 40 of title 28, United States Code, shall file reports required under this title with the Director of the Office of Government Ethics.

(c) Copies of the reports required to be filed under this title by the Postmaster General, the Deputy Postmaster General, the Governors of the Board of Governors of the United States Postal Service, designated agency ethics officials, employees described in section 105(a)(2)(A) or (B), 106(a)(1)(A) or (B), or 107(a)(1)(A) or (b)(1)(A)(i), of title 3, United States Code, candidates for the office of President or Vice President and officers and employees in (and nominees to) offices or positions which require confirmation by the Senate or by both Houses of Congress other than individuals nominated to be judicial officers and those referred to in subsection (f) shall be transmitted to the Director of the Office of Government Ethics. The Director shall forward a copy of the report of each nominee to the congressional committee considering the nomination.

(d) Reports required to be filed under this title by the Director of the Office of Government Ethics shall be filed in the Office of Government Ethics and, immediately after being filed, shall be made available to the public in accordance with this title.

(e) Each individual identified in section 101(c) who is a candidate for nomination or election to the Office of President or Vice President shall file the reports required by this title with the Federal Election Commission.

(f) Reports required of members of the uniformed services shall be filed with the Secretary concerned.

(g) Each supervising ethics office shall develop and make available forms for reporting the information required by this title.

(h)(1) The reports required under this title shall be filed by a reporting individual with-

(A)(i)(I) the Clerk of the House of Representatives, in the case of a Representative in Congress, a Delegate to Congress, the Resident Commissioner from Puerto Rico, an officer or employee of the Congress whose compensation is disbursed by the Clerk of the House of Representatives, an officer or employee of the Architect of the Capitol, the United States Botanic Garden, the Congressional Budget Office, the Government Printing Office, the Library of Congress, or the Copyright Royalty Tribunal (including any individual terminating service, under section 101(e), in any office or position referred to in this subclause), or an individual described in section 101(c) who is a candidate for nomination or election as a Representative in Congress, a Delegate to Congress, or the Resident Commissioner from Puerto Rico; and

(II) the Secretary of the Senate, in the case of a Senator, an officer or employee of the Congress whose compensation is disbursed by the Secretary of the Senate, an officer or employee of the General Accounting Office, the Office of Technology Assessment, or the Office of the Attending Physician (including any individual terminating service, under section 101(e), in any office or position referred to in this subclause), or an individual described in section 101(c) who is a candidate for nomination or election as a Senator; and

(ii) in the case of an officer or employee of the Congress as described under section 101(f)(10) who is employed by an agency or commission established in the legislative branch after the date of the enactment of the Ethics Reform Act of 1989-

(I) the Secretary of the Senate or the Clerk of the House of Representatives, as the case may be, as designated in the statute establishing such agency or commission; or

(II) if such statute does not designate such committee, the Secretary of the Senate for agencies and commissions established in even numbered calendar years, and the Clerk of the House of Representatives for agencies and commissions established in odd numbered calendar years; and

(B) the Judicial Conference with regard to a judicial officer or employee described under paragraphs (11) and (12) of section 101(f) (including individuals terminating service in such office or position under section 101(e) or immediately preceding service in such office or position).

(2) The date any report is received (and the date of receipt of any supplemental report) shall be noted on such report by such committee.

(i) A copy of each report filed under this title by a Member or an individual who is a candidate for the office of Member shall be sent by the Clerk of the House of Representatives or Secretary of the Senate, as the case may be, to the appropriate State officer designated under section 316(a) of the Federal Election Campaign Act of 1971 of the State represented by the Member or in which the individual is a candidate, as the case may be, within the 30-day period beginning on the day the report is filed with the Clerk or Secretary.

(j)(1) A copy of each report filed under this title with the Clerk of the House of Representatives shall be sent by the Clerk to the Committee on Standards of Official Conduct of the House of Representatives within the 7-day period beginning on the day the report is filed.

(2) A copy of each report filed under this title with the Secretary of the Senate shall be sent by the Secretary to the Select Committee on Ethics of the Senate within the 7-day period beginning on the day the report is filed.

(k) In carrying out their responsibilities under this title with respect to candidates for office, the Clerk of the House of Representatives and the Secretary of the Senate shall avail themselves of the assistance of the Federal Election Commission. The Commission shall make available to the Clerk and the Secretary on a regular basis a complete list of names and addresses of all candidates registered with the Commission, and shall cooperate and coordinate its candidate information and notification program with the Clerk and the Secretary to the greatest extent possible.

(Pub. L. No. 95-521, title I, §103, Oct. 26, 1978, 92 Stat. 1831; Pub. L. No. 96-19, §§4(b)(2), 9(a), June 13, 1979, 93 Stat. 40, 42; Pub. L. No. 101-194, title II, §202, Nov. 30, 1989, 103 Stat. 1736; Pub. L. No. 101-280, §3(1), (4), May 4, 1990, 104 Stat. 152, 153; Pub. L. No. 102-90, title III, §313(1), Aug. 14, 1991, 105 Stat. 469.)

§104. Failure to file or filing false reports

(a) The Attorney General may bring a civil action in any appropriate United States district court against any individual who knowingly and willfully falsifies or who knowingly and willfully fails to file or report any information that such individual is required to report pursuant to section 102. The court in which such action is brought may assess against suchindividual a civil penalty in any amount, not to exceed $10,000.

(b) The head of each agency, each Secretary concerned, the Director of the Office of Government Ethics, each congressional ethics committee, or the Judicial Conference, as the case may be, shall refer to the Attorney General the name of any individual which such official or committee has reasonable cause to believe has willfully failed to file a report or has willfully falsified or willfully failed to file information required to be reported. Whenever the Judicial Conference refers a name to the Attorney General under this subsection, the Judicial Conference also shall notify the judicial council of the circuit in which the named individual serves of the referral.

(c) The President, the Vice President, the Secretary concerned, the head of each agency, the Office of Personnel Management, a congressional ethics committee, and the Judicial Conference, may take any appropriate personnel or other action in accordance with applicable law or regulation against any individual failing to file a report or falsifying or failing to report information required to be reported.

(d)(1) Any individual who files a report required to be filed under this title more than 30 days after the later of-

(A) the date such report is required to be filed pursuant to the provisions of this title and the rules and regulations promulgated thereunder; or

(B) if a filing extension is granted to such individual under section 101(g), the last day of the filing extension period,

shall, at the direction of and pursuant to regulations issued by the supervising ethics office, pay a filing fee of $200. All such fees shall be deposited in the miscellaneous receipts of the Treasury. The authority under this paragraph to direct the payment of a filing fee may be delegated by the supervising ethics office in the executive branch to other agencies in the executive branch.

(2) The supervising ethics office may waive the filing fee under this subsection in extraordinary circumstances.

(Pub. L. No. 95-521, title I, §104, Oct. 26, 1978, 92 Stat. 1832; Pub. L. No. 96-19, §8(a), June 13, 1979, 93 Stat. 41; Pub. L. No. 101-194, title II, §202, Nov. 30, 1989, 103 Stat. 1737; Pub. L. No. 101-280, §3(1), (5), May 4, 1990, 104 Stat. 152, 154; Pub. L. No. 101-650, title IV, §405, Dec. 1, 1990, 104 Stat. 5124.)

§105. Custody of and public access to reports

(a) Each agency, each supervising ethics office in the executive or judicial branch, the Clerk of the House of Representatives, and the Secretary of the Senate shall make available to the public, in accordance with subsection (b), each report filed under this title with such agency or office or with the Clerk or the Secretary of the Senate, except that-

(1) this section does not require public availability of a report filed by any individual in the Central Intelligence Agency, the Defense Intelligence Agency, or the National Security Agency, or any individual engaged in intelligence activities in any agency of the United States, if the President finds or has found that, due to the nature of the office or position occupied by such individual, public disclosure of such report would, be[1] revealing the identity of the individual or other sensitive information, compromise the national interest of the United States; and such individuals may be authorized, notwithstanding section 104(a), to file such additional reports as are necessary to protect their identity from public disclosure

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[1] So in original. Probably should be "by".

if the President first finds or has found that such filing is necessary in the national interest; and

(2) any report filed by an independent counsel whose identity has not been disclosed by the division of the court under chapter 40 of title 28, United States Code, and any report filed by any person appointed by that independent counsel under such chapter, shall not be made available to the public under this title.

(b)(1) Except as provided in the second sentence of this subsection, each agency, each supervising ethics office in the executive or judicial branch, the Clerk of the House of Representatives, and the Secretary of the Senate shall, within thirty days after any report is received under this title by such agency or office or by the Clerk or the Secretary of the Senate, as the case may be, permit inspection of such report by or furnish a copy of such report to any person requesting such inspection or copy. With respect to any report required to be filed by May 15 of any year, such report shall be made available for public inspection within 30 calendar days after May 15 of such year or within 30 days of the date of filing of such a report for which an extension is granted pursuant to section 101(g). The agency, office, Clerk, or Secretary of the Senate, as the case may be may require a reasonable fee to be paid in any amount which is found necessary to recover the cost of reproduction or mailing of such report excluding any salary of any employee involved in such reproduction or mailing. A copy of such report may be furnished without charge or at a reduced charge if it is determined that waiver or reduction of the fee is in the public interest.

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(2) Notwithstanding paragraph (1), a report may not be made available under this section to any person nor may any copy thereof be provided under this section to any person except upon a written application by such person stating-

(A) that person's name, occupation and address;

(B) the name and address of any other person or organization on whose behalf the inspection or copy is requested; and

(C) that such person is aware of the prohibitions on the obtaining or use of the report.

Any such application shall be made available to the public throughout the period during which the report is made available to the public.

(c)(1) It shall be unlawful for any person to obtain or use a report-

(A) for any unlawful purpose;

(B) for any commercial purpose, other than by news and communications media for dissemination to the general public;

(C) for determining or establishing the credit rating of any individual; or

(D) for use, directly or indirectly, in the solicitation of money for any political, charitable, or other purpose.

(2) The Attorney General may bring a civil action against any person who obtains or uses a report for any purpose prohibited in paragraph (1) of this subsection. The court in which such action is brought may assess against such person a penalty in any amount not to exceed $10,000. Such remedy shall be inaddition to any other remedy available under statutory or common law.

(d) Any report filed with or transmitted to an agency or supervising ethics office or to the Clerk of the House of Representatives or the Secretary of the Senate pursuant to this title shall be retained by such agency or office or by the Clerk or the Secretary of the Senate, as the case may be. Such report shall be made available to the public for a period of six years after receipt of the report. After such six-year period the report shall be destroyed unless needed in an ongoing investigation, except that in the case of an individual who filed the report pursuant to section 101(b) and was not subsequently confirmed by the Senate, or who filed the report pursuant to section 101(c) and was not subsequently elected, such reports shall be destroyed one year after the individual either is no longer under consideration by the Senate or is no longer a candidate for nomination or election to the Office of President, Vice President, or as a Member of Congress, unless needed in an ongoing investigation.

(Pub. L. No. 95-521, title I, §105, Oct. 26, 1978, 92 Stat. 1833; Pub. L. No. 101-194, title II, §202, Nov. 30, 1989, 103 Stat. 1737; Pub. L. No. 101-280, §3(6), May 4, 1990, 104 Stat. 154; Pub. L. No. 102-90, title III, §313(2), Aug. 14, 1991, 105 Stat. 469.)

§106. Review of reports

(a)(1) Each designated agency ethics official or Secretary concerned shall make provisions to ensure that each report filed with him under this title is reviewed within sixty days after the date of such filing, except that the Director of the Office of Government Ethics shall review only those reports required to be transmitted to him under this title within sixty days after the date of transmittal.

(2) Each congressional ethics committee and the Judicial Conference shall make provisions to ensure that each report filed under this title is reviewed within sixty days after the date of such filing.

(b)(1) If after reviewing any report under subsection (a), the Director of the Office of Government Ethics, the Secretary concerned, the designated agency ethics official, a person designated by the congressional ethics committee, or a person designated by the Judicial Conference, as the case may be, is of the opinion that on the basis of information contained in such report the individual submitting such report is in compliance with applicable laws and regulations, he shall state such opinion on the report, and shall sign such report.

(2) If the Director of the Office of Government Ethics, the Secretary concerned, the designated agency ethics official, a person designated by the congressional ethics committee, or a person designated by the Judicial Conference, after reviewing any report under subsection (a)-

(A) believes additional information is required to be submitted, he shall notify the individual submitting such report what additional information is required and the time by which it must be submitted, or

(B) is of the opinion, on the basis of information submitted, that the individual is not in compliance with applicable laws and regulations, he shall notify the individual, afford a reasonable opportunity for a written or oral response, and after consideration of such response, reach an opinion as to whether or not, on the basis of information submitted, the individual is in compliance with such laws and regulations.

(3) If the Director of the Office of Government Ethics, the Secretary concerned, the designated agency ethics official, a person designated by a congressional ethics committee, or a person designated by the Judicial Conference, reaches an opinion under paragraph (2)(B) that an individual is not in compliance with applicable laws and regulations, the official or committee shall

notify the individual of that opinion and, after an opportunity for personal consultation (if practicable), determine and notify the individual of which steps, if any, would in the opinion of such official or committee be appropriate for assuring compliance with such laws and regulations and the date by which such steps should be taken. Such steps may include, as appropriate-

(A) divestiture,

(B) restitution,

(C) the establishment of a blind trust,

(D) request for an exemption under section 208(b) of title 18, United States Code, or

(E) voluntary request for transfer, reassignment, limitation of duties, or resignation.

The use of any such steps shall be in accordance with such rules or regulations as the supervising ethics office may prescribe.

(4) If steps for assuring compliance with applicable laws and regulations are not taken by the date set under paragraph (3) by an individual in a position in the executive branch (other than in the Foreign Service or the uniformed services), appointment to which requires the advice and consent of the Senate, the matter shall be referred to the President for appropriate action.

(5) If steps for assuring compliance with applicable laws and regulations are not taken by the date set under paragraph (3) by a member of the Foreign Service or the uniformed services, the Secretary concerned shall take appropriate action.

(6) If steps for assuring compliance with applicable laws and regulations are not taken by the date set under paragraph (3) by any other officer or employee, the matter shall be referred to the head of the appropriate agency, the congressional ethics committee, or the Judicial Conference, for appropriate action; except that in the case of the Postmaster General or Deputy Postmaster General, the Director of the Office of Government Ethics shall recommend to the Governors of the Board of Governors of the United States Postal Service the action to be taken.

(7) Each supervising ethics office may render advisory opinions interpreting this title within its respective jurisdiction. Notwithstanding any other provision of law, the individual to whom a public advisory opinion is rendered in accordance with this paragraph, and any other individual covered by this title who is involved in a fact situation which is indistinguishable in all material aspects, and who acts in good faith in accordance with the provisions and findings of such advisory opinion shall not, as a result of such act, be subject to any penalty or sanction provided by this title.

(Pub. L. No. 95-521, title I, §106, Oct. 26, 1978, 92 Stat. 1833; Pub. L. No. 101-194, title II, §202, Nov. 30, 1989, 103 Stat. 1739; Pub. L. No. 101-280, §3(1), (7), May 4, 1990, 104 Stat. 152, 155.)

§107. Confidential reports and other additional requirements

(a)(1) Each supervising ethics office may require officers and employees under its jurisdiction (including special Government employees as defined in section 202 of title 18, United States Code) to file confidential financial disclosure reports, in such form as the supervising ethics office may prescribe. The information required to be reported under this subsection by the officers and employees of any department or agency shall be set forth in rules or regulations prescribed by the supervising ethics office, and may be less extensive than otherwise required by this title, or more extensive when determined by the supervising ethics office to be necessary and appropriate in light of sections 202 through 209 of title 18, United States Code, regulations promulgated thereunder, or the authorized activities of such officers or employees. Any individual required to file a report pursuant to section 101 shall not be required to file a confidential report pursuant to this subsection, except with respect to information which is more extensive than information otherwise required by this title. Subsections (a), (b), and (d) of section 105 shall not apply with respect to any such report.

(2) Any information required to be provided by an individual under this subsection shall be confidential and shall not be disclosed to the public.

(3) Nothing in this subsection exempts any individual otherwise covered by the requirement to file a public financial disclosure report under this title from such requirement.

(b) The provisions of this title requiring the reporting of information shall supersede any general requirement under any other provision of law or regulation with respect to the reporting of information required for purposes of preventing conflicts of interest or apparent conflicts of interest. Such provisions of this title shall not supersede the requirements of section 7342 of title 5, United States Code.

(c) Nothing in this Act requiring reporting of information shall be deemed to authorize the receipt of income, gifts, or reimbursements; the holding of assets, liabilities, or positions; or the participation in transactions that are prohibited by law, Executive order, rule, or regulation.

(Pub. L. No. 95-521, title I, §107, Oct. 26, 1978, 92 Stat. 1834; Pub. L. No. 96-19, §9(d), (g), June 13, 1979, 93 Stat. 42, 43; Pub. L. No. 101-194, title II, §202, Nov. 30, 1989, 103 Stat. 1740.)

§108. Authority of Comptroller General

(a) The Comptroller General shall have access to financial disclosure reports filed under this title for the purposes of carrying out his statutory responsibilities.

(b) No later than December 31, 1992, and regularly thereafter, the Comptroller General shall conduct a study to determine whether the provisions of this title are being carried out effectively.

(Pub. L. No. 950-521, title I, §108, Oct. 26, 1978, 92 Stat. 1835; Pub. L. No. 96-19, §9(t), June 13, 1979, 93 Stat. 44; Pub. L. No. 101-194, title II, §202, Nov. 30, 1989, 103 Stat. 1741.)

§109. Definitions

For the purposes of this title, the term-

(1) "congressional ethics committees" means the Select Committee on Ethics of the Senate and the Committee on Standards of Official Conduct of the House of Representatives;

(2) "dependent child" means, when used with respect to any reporting individual, any individual who is a son, daughter, stepson, or stepdaughter and who-

(A) is unmarried and under age 21 and is living in the household of such reporting individual; or

(B) is a dependent of such reporting individual within the meaning of section 152 of the Internal Revenue Code of 1986 [26 U.S.C. 152];

(3) "designated agency ethics official" means an officer or employee who is designated to administer the provisions of this title within an agency;

(4) "executive branch" includes each Executive agency (as defined in section 105 of title 5, United States Code), other than the General Accounting Office, and any other entity or administrative unit in the executive branch;

(5) "gift" means a payment, advance, forbearance, rendering, or deposit of money, or any thing of value, unless consideration of equal or greater value is received by the donor, but does not include-

(A) bequest and other forms of inheritance;

(B) suitable mementos of a function honoring the reporting individual;

(C) food, lodging, transportation, and entertainment provided by a foreign government within a foreign country or by the United States Government, the District of Columbia, or a State or local government or political subdivision thereof;

(D) food and beverages which are not consumed in connection with a gift of overnight lodging;

(E) communications to the offices of a reporting individual, including subscriptions to newspapers and periodicals; or

(F) consumable products provided by home-State businesses to the offices of a reporting individual who is an elected official, if those products are intended for consumption by persons other than such reporting individual;

(6) "honoraria" has the meaning given such term in section 505 of this Act;

(7) "income" means all income from whatever source derived, including but not limited to the following items: compensation for services, including fees, commissions, and similar items; gross income derived from business (and net income if the individual elects to include it); gains derived from dealings in property; interest; rents; royalties; dividends; annuities; income from life insurance and endowment contracts; pensions; income from discharge of indebtedness; distributive share of partnership income; and income from an interest in an estate or trust;

(8) "judicial employee" means any employee of the judicial branch of the Government, of the United States Sentencing Commission, of the Tax Court, of the Claims Court, of the Court of Veterans Appeals, or of the United States Court of Military Appeals, who is not a judicial officer and who is authorized to perform adjudicatory functions with respect to proceedings in the judicial branch, or who is paid at a rate of basic pay equal to or greater than the minimum rate of basic pay in effect for grade GS-16 of the General Schedule;

(9) "Judicial Conference" means the Judicial Conference of the United States;

(10) "judicial officer" means the Chief Justice of the United States, the Associate Justices of the Supreme Court, and the judges of the United States courts of appeals, United States district courts, including the district courts in Guam, the Northern Mariana Islands, and the Virgin Islands, Court of Appeals

for the Federal Circuit, Court of International Trade, Tax Court, Claims Court, Court of Veterans Appeals, United States Court of Military Appeals, and any court created by Act of Congress, the judges of which are entitled to hold office during good behavior;

(11) "legislative branch" includes-

(A) the Architect of the Capitol;

(B) the Botanic Gardens;

(C) the Congressional Budget Office;

(D) the General Accounting Office;

(E) the Government Printing Office;

(F) the Library of Congress;

(G) the United States Capitol Police;

(H) the Office of Technology Assessment; and

(I) any other agency, entity, office, or commission established in the legislative branch;

(12) "Member of Congress" means a United States Senator, a Representative in Congress, a Delegate to Congress, or the Resident Commissioner from Puerto Rico;

(13) "officer or employee of the Congress" means-

(A) any individual described under subparagraph (B), other than a Member of Congress or the Vice President, whose compensation is disbursed by the Secretary of the Senate or the Clerk of the House of Representatives;

(B)(i) each officer or employee of the legislative branch who is compensated for at least 60 days at a rate of basic pay equal to or greater than the annual rate of basic pay in effect for grade GS-16 of the General Schedule; and

(ii) at least one principal assistant designated for purposes of this paragraph by each Member who does not have an employee compensated at a rate equal to or in excess of the annual rate of basic pay in effect for grade GS-16 of the General Schedule;

(14) "personal hospitality of any individual" means hospitality extended for a nonbusiness purpose by an individual, not a corporation or organization, at the personal residence of that individual or his family or on property or facilities owned by that individual or his family;

(15) "reimbursement" means any payment or other thing of value received by the reporting individual, other than gifts, to cover travel-related expenses of such individual other than those which are-

(A) provided by the United States Government, the District of Columbia, or a State or local government or political subdivision thereof;

(B) required to be reported by the reporting individual under section 7342 of title 5, United States Code; or

(C) required to be reported under section 304 of the Federal Election Campaign Act of 1971 (2 U.S.C. 434);

(16) "relative" means an individual who is related to the reporting individual, as father, mother, son, daughter, brother, sister, uncle, aunt, great aunt, great uncle, first cousin, nephew, niece, husband, wife, grandfather, grandmother, grandson, granddaughter, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, half sister, or who is the grandfather or

grandmother of the spouse of the reporting individual, and shall be deemed to include the fiance or fiancee of the reporting individual;

(17) "Secretary concerned" has the meaning set forth in section 101(8) of title 10, United States Code, and, in addition, means-

(A) the Secretary of Commerce, with respect to matters concerning the National Oceanic and Atmospheric Administration;

(B) the Secretary of Health and Human Services, with respect to matters concerning the Public Health Service; and

(C) the Secretary of State, with respect to matters concerning the Foreign Service;

(18) "supervising ethics office" means-

(A) the Select Committee on Ethics of the Senate, for Senators, officers and employees of the Senate, and other officers or employees of the legislative branch required to file financial disclosure reports with the Secretary of the Senate pursuant to section 103(h) of this title;

(B) the Committee on Standards of Official Conduct of the House of Representatives, for Members, officers and employees of the House of Representatives and other officers or employees of the legislative branch required to file financial disclosure reports with the Clerk of the House of Representatives pursuant to section 103(h) of this title;

(C) the Judicial Conference for judicial officers and judicial employees; and

(D) the Office of Government Ethics for all executive branch officers and employees; and

(19) "value" means a good faith estimate of the dollar value if the exact value is neither known nor easily obtainable by the reporting individual.

(Pub. L. No. 95-521, title I, §109, Oct. 26, 1978, 92 Stat. 1836; Pub. L. No. 101-194, title II, §202, Nov. 30, 1989, 103 Stat. 1741; Pub. L. No. 101-280, §3(1), (8), May 4, 1990, 104 Stat. 152, 155.)

§110. Notice of actions taken to comply with ethics agreements

(a) In any case in which an individual agrees with that individual's designated agency ethics official, the Office of Government Ethics, a Senate confirmation committee, a congressional ethics committee, or the Judicial Conference, to take any action to comply with this Act or any other law or regulation governing conflicts of interest of, or establishing standards of conduct applicable with respect to, officers or employees of the Government, that individual shall notify in writing the designated agency ethics official, the Office of Government Ethics, the appropriate committee of the Senate, the congressional ethics committee, or the Judicial Conference, as the case may be, of any action taken by the individual pursuant to that agreement. Such notification shall be made not later than the date specified in the agreement by which action by the individual must be taken, or not later than three months after the date of the agreement, if no date for action is so specified.

(b) If an agreement described in subsection (a) requires that the individual recuse himself or herself from particular categories of agency or other official action, the individual shall reduce to writing those subjects regarding which the recusal agreement will apply and the process by which it will be determined whether the individual must recuse himself or herself in a specific instance. An individual shall be considered to have complied with the requirements of subsection (a) with respect to such recusal agreement if such individual files a copy of the document setting forth the information described in the preceding sentence with such individual's designated agency ethics official or the appropriate supervising ethics office within the time prescribed in the last sentence of subsection (a).

(Pub. L. No. 95-521, title I, §110, as added Pub. L. No. 101-194, title II, §202, Nov. 30, 1989, 103 Stat. 1744, and amended Pub. L. No. 101-280, §3(1), May 4, 1990, 104 Stat. 152.)

§111. Administration of provisions

The provisions of this title shall be administered by-

(1) the Director of the Office of Government Ethics, the designated agency ethics official, or the Secretary concerned, as appropriate, with regard to officers and employees described in paragraphs (1) through (8) of section 101(f);

(2) the Select Committee on Ethics of the Senate and the Committee on Standards of Official Conduct of the House of Representatives, as appropriate, with regard to officers and employees described in paragraphs (9) and (10) of section 101(f); and

(3) the Judicial Conference in the case of an officer or employee described in paragraphs (11) and (12) of section 101(f).

The Judicial Conference may delegate any authority it has under this title to an ethics committee established by the Judicial Conference.

(Pub. L. No. 95-521, title I, §111, as added Pub. L. No. 101-194, title II, §202, Nov. 30, 1989, 103 Stat. 1744, and amended Pub. L. No. 101-280, §3(1), (9), May 4, 1990, 104 Stat. 152, 157.)

[§112. Repealed. Pub. L. No. 101-280, §3(10)(A), May 4, 1990, 104 Stat. 157]

Ethics in Government Act and Related Statues

Title 18, U.S. Code

Chapter 11-Bribery, Graft, and Conflicts of Interest

§201. Bribery of public officials and witnesses.
§202. Definitions.
§203. Compensation to Members of Congress, officers and others,[1] in matters affecting the Government.
§204. Practice in United States Claims Court or United States Court of Appeals for the Federal Circuit by Members of Congress.
§205. Activities of officers and employees in claims against and other matters affecting the Government.
§206. Exemption of retired officers of the uniformed services.
§207. Restrictions on former officers, employees, and elected officials of the executive and legislative branches.
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§209. Salary of Government officials and employees payable only by United States.
§210. Offer to procure appointive public office.
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§215. Receipt of commissions or gifts for procuring loans.
§216. Penalties and injunctions.
§217. Acceptance of consideration for adjustment of farm indebtedness.
§218. Voiding transactions in violation of chapter; recovery by the United States.

§201. Bribery of public officials and witnesses

(a) For the purpose of this section-

(1) the term "public official" means Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of

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[1] So in original. Does not conform to section catchline.

Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror;

(2) the term "person who has been selected to be a public official" means any person who has been nominated or appointed to be a public official, or has been officially informed that such person will be so nominated or appointed; and

(3) the term "official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.

(b) Whoever-

(1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent-

(A) to influence any official act; or

(B) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of the lawful duty of such official or person;

(2) being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:

(A) being influenced in the performance of any official act;

(B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud on the United States; or

(C) being induced to do or omit to do any act in violation of the official duty of such official or person;

(3) directly or indirectly, corruptly gives, offers, or promises anything of value to any person, or offers or promises such person to give anything of value to any other person or entity, with intent to influence the testimony under oath or affirmation of such first-mentioned person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or with intent to influence such person to absent himself therefrom;

(4) directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity in return for being influenced in testimony under oath or affirmation as a witness upon any such trial, hearing, or other proceeding, or in return for absenting himself therefrom;

shall be fined not more than three times the monetary equivalent of the thing of value, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

(c) Whoever-

(1) otherwise than as provided by law for the proper discharge of official duty-

(A) directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official; or

(B) being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of any official act performed or to be performed by such official or person;

(2) directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of such person's absence therefrom;

(3) directly or indirectly, demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon any such trial, hearing, or other proceeding, or for op because of such person's absence therefrom;

shall be fined under this title or imprisoned for not more than two years, or both.

(d) Paragraphs (3) and (4) of subsection (b) and paragraphs (2) and (3) of subsection (c) shall not be construed to prohibit the payment or receipt of witness fees provided by law, or the payment, by the party upon whose behalf a witness is called and receipt by a witness, of the reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance at any such trial, hearing, or proceeding, or in the case of expert witnesses, a reasonable fee for time spent in the preparation of such opinion, and in appearing and testifying.

(e) The offenses and penalties prescribed in this section are separate from and in addition to those prescribed in sections 1503, 1504, and 1505 of this title.

(Added Pub. L. No. 87-849, §1(a), Oct. 23, 1962, 76 Stat. 1119, and amended Pub. L. No. 91-405, title II, §204(d)(1), Sept. 22, 1970, 84 Stat. 853; Pub. L. No. 99-646, §46(a)-(l), Nov. 10, 1986, 100 Stat. 3601-3604.)

§202. Definitions

(a) For the purpose of sections 203, 205, 207, 208, and 209 of this title the term "special Government employee" shall mean an officer or employee of the executive or legislative branch of the United States Government, of any independent agency of the United States or of the District of Columbia, who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days, temporary duties either on a full-time or intermittent basis, a part-time United States commissioner, a part-time United States magistrate, or, regardless of the number of days of appointment, an independent counsel appointed under chapter 40 of title 28 and any person appointed by that independent counsel under section 594(c) of title 28. Notwithstanding the next preceding sentence, every person serving as apart-time local representative of a Member of Congress in the Member's home district or State shall be classified as a special Government employee. Notwithstanding section 29(c) and (d) of the Act of August 10, 1956 (70A Stat. 632; 5 U.S.C. 30r(c) and (d)), a Reserve officer of the Armed Forces, or an officer of the National Guard of the United States, unless otherwise an officer or employee of the United States, shall be classified as a special Government employee while on active duty solely for training. A Reserve officer of the Armed Forces or an officer of the National Guard of the United States who is voluntarily serving a period of extended active duty in excess of one hundred and thirty days shall be classified as an officer of the United States within the meaning of section 203 and sections 205 through 209 and 218. Reserve officer of the Armed Forces or an officer of the National Guard of the United States who is serving involuntarily shall be classified as a special Government employee. The terms "officer or employee" and "special Government employee" as used in sections 203, 205, 207 through 209, and 218, shall not include enlisted members of the Armed Forces.

(b) For the purposes of sections 205 and 207 of this title, the term ``official responsibility'' means the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government action.

(c) Except as otherwise provided in such sections, the terms "officer" and "employee" in sections 203, 205, 207 through 209, and 218 of this title shall not include the President, the Vice President, a Member of Congress, or a Federal judge.

(d) The term "Member of Congress" in sections 204 and 207 means-

(1) a United States Senator; and

(2) a Representative in, or a Delegate or Resident Commissioner to, the House of Representatives.

(e) As used in this chapter, the term-

(1) "executive branch" includes each executive agency as defined in title 5, and any other entity or administrative unit in the executive branch;

(2) "judicial branch" means the Supreme Court of the United States; the United States courts of appeals; the United States district courts; the Court of International Trade; the United States bankruptcy courts; any court created pursuant to article I of the United States Constitution, including the Court of Military Appeals, the United States Claims Court, and the United States Tax Court, but not including a court of a territory or possession of the United States; the Federal Judicial Center; and any other agency, office, or entity in the judicial branch; and

(3) "legislative branch" means-

(A) the Congress; and

(B) the Office of the Architect of the Capitol, the United States Botanic Garden, the General Accounting Office, the Government Printing Office, the

Library of Congress, the Office of Technology Assessment, the Congressional Budget Office, the United States Capitol Police, and any other agency, entity, office, or commission established in the legislative branch.

(Added Pub. L. No. 87-849, §1(a), Oct. 23, 1962, 76 Stat. 1121, and amended Pub. L. No. 90-578, title III, §301(b), Oct. 17, 1968, 82 Stat. 1115; Pub. L. No. 100-191, §3(a), Dec. 15, 1987, 101 Stat. 1306; Pub. L. No. 101-194, title IV, §401, Nov. 30, 1989, 103 Stat. 1747; Pub. L. No. 101-280, §5(a), May 4, 1990, 104 Stat. 158.)

§203. Compensation to Members of Congress, officers, and others in matters affecting the Government

(a) Whoever, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly-

(1) demands, seeks, receives, accepts, or agrees to receive or accept any compensation for any representational services, as agent or attorney or otherwise, rendered or to be rendered either personally or by another-

(A) at a time when such person is a Member of Congress, Member of Congress Elect, Delegate, Delegate Elect, Resident Commissioner, or Resident Commissioner Elect; or

(B) at a time when such person is an officer or employee or Federal judge of the United States in the executive, legislative, or judicial branch of the Government, or in any agency of the United States,

in relation to any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest, before any department, agency, court, court-martial, officer, or any civil, military, or naval commission; or

(2) knowingly gives, promises, or offers any compensation for any such representational services rendered or to be rendered at a time when the person to whom the compensation is given, promised, or offered, is or was such a Member, Member Elect, Delegate, Delegate Elect, Commissioner, Commissioner Elect, Federal judge, officer, or employee;

shall be subject to the penalties set forth in section 216 of this title.

(b) Whoever, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly-

(1) demands, seeks, receives, accepts, or agrees to receive or accept any compensation for any representational services, as agent or attorney or otherwise, rendered or to be rendered either personally or by another, at a time when such person is an officer or employee of the District of Columbia, in relation to any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the District of Columbia is a party or has a direct and substantial interest, before any department, agency, court, officer, or commission; or

(2) knowingly gives, promises, or offers any compensation for any such representational services rendered or to be rendered at a time when the person to whom the compensation is given, promised, or offered, is or was an officer or employee of the District of Columbia;

shall be subject to the penalties set forth in section 216 of this title.

(c) A special Government employee shall be subject to subsections (a) and (b) only in relation to a particular matter involving a specific party or parties-

(1) in which such employee has at any time participated personally and substantially as a Government employee or as a special Government employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise; or

(2) which is pending in the department or agency of the Government in which such employee is serving except that paragraph (2) of this subsection shall not apply in the case of a special Government employee who has served in such department or agency no more than sixty days during the immediately preceding period of three hundred and sixty-five consecutive days.

(d) Nothing in this section prevents an officer or employee, including a special Government employee, from acting, with or without compensation, as agent or attorney for or otherwise representing his parents, spouse, child, or any person for whom, or for any estate for which, he is serving as guardian, executor, administrator, trustee, or other personal fiduciary except-

(1) in those matters in which he has participated personally and substantially as a Government employee or as a special Government employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise; or

(2) in those matters that are the subject of his official responsibility,

subject to approval by the Government official responsible for appointment to his position.

(e) Nothing in this section prevents a special Government employee from acting as agent or attorney for another person in the performance of work under a grant by, or a contract with or for the benefit of, the United States if the head of the department or agency concerned with the grant or contract certifies in writing that the national interest so requires and publishes such certification in the Federal Register.

(f) Nothing in this section prevents an individual from giving testimony under oath or from making statements required to be made under penalty of perjury.

(Added Pub. L. No. 87-849, §1(a), Oct. 23, 1962, 76 Stat. 1121, and amended Pub. L. No. 91-405, title II, §204(d)(2), (3), Sept. 22, 1970, 84 Stat. 853; Pub. L. No. 99-646, §47(a), Nov. 10, 1986, 100 Stat. 3604; Pub. L. No. 101-194, title IV, §402, Nov. 30, 1989, 103 Stat. 1748; Pub. L. No. 101-280, §5(b), May 4, 1990, 104 Stat. 159.)

§204. Practice in United States Claims Court or the United States Court of Appeals for the Federal Circuit by Members of Congress

Whoever, being a Member of Congress or Member of Congress Elect, practices in the United States Claims Court or the United States Court of Appeals for the Federal Circuit shall be subject to the penalties set forth in section 216 of this title.

(Added Pub. L. No. 87-849, §1(a), Oct. 23, 1962, 76 Stat. 1122, and amended Pub. L. No. 91-405, title II, §204(d)(2), Sept. 22, 1970, 84 Stat. 853; Pub. L. No. 97-164, title I, §147, Apr. 2, 1982, 96 Stat. 45; Pub. L. No. 101-194, title IV, §403, Nov. 30, 1989, 103 Stat. 1749.)

§205. Activities of officers and employees in claims against and other matters affecting the Government

(a) Whoever, being an officer or employee of the United States in the executive, legislative, or judicial branch of the Government or in any agency of the United States, other than in the proper discharge of his official duties-

(1) acts as agent or attorney for prosecuting any claim against the United States, or receives any gratuity, or any share of or interest in any such claim, in consideration of assistance in the prosecution of such claim; or

(2) acts as agent or attorney for anyone before any department, agency, court, court-martial, officer, or civil, military, or naval commission in connection with any covered matter in which the United States is a party or has a direct and substantial interest;

shall be subject to the penalties set forth in section 216 of this title.

(b) Whoever, being an officer or employee of the District of Columbia or an officer or employee of the Office of the United States Attorney for the District of Columbia, otherwise than in the proper discharge of official duties-

(1) acts as agent or attorney for prosecuting any claim against the District of Columbia, or receives any gratuity, or any share of or interest in any such claim in consideration of assistance in the prosecution of such claim; or

(2) acts as agent or attorney for anyone before any department, agency, court, officer, or commission in connection with any covered matter in which the District of Columbia is a party or has a direct and substantial interest;

shall be subject to the penalties set forth in section 216 of this title.

(c) A special Government employee shall be subject to subsections (a) and (b) only in relation to a covered matter involving a specific party or parties-

(1) in which he has at any time participated personally and substantially as a Government employee or special Government employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise; or

(2) which is pending in the department or agency of the Government in which he is serving.

Paragraph (2) shall not apply in the case of a special Government employee who has served in such department or agency no more than sixty days during the immediately preceding period of three hundred and sixty-five consecutive days.

(d) Nothing in subsection (a) or (b) prevents an officer or employee, if not inconsistent with the faithful performance of his duties, from acting without compensation as agent or attorney for, or otherwise representing, any person who is the subject of disciplinary, loyalty, or other personnel administration proceedings in connection with those proceedings.

(e) Nothing in subsection (a) or (b) prevents an officer or employee, including a special Government employee, from acting, with or without compensation, as agent or attorney for, or otherwise representing, his parents, spouse, child, or any person for whom, or for any estate for which, he is serving as guardian, executor, administrator, trustee, or other personal fiduciary except-

(1) in those matters in which he has participated personally and substantially as a Government employee or special Government employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, or

(2) in those matters which are the subject of his official responsibility,
subject to approval by the Government official responsible for appointment to his position.

(f) Nothing in subsection (a) or (b) prevents a special Government employee from acting as agent or attorney for another person in the performance of work under a grant by, or a contract with or for the benefit of, the United States if the head of the department or agency concerned with the grant or contract certifies in writing that the national interest so requires and publishes such certification in the Federal Register.

(g) Nothing in this section prevents an officer or employee from giving testimony under oath or from making statements required to be made under penalty for perjury or contempt.

(h) For the purpose of this section, the term "covered matter" means any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter.
(Added Pub. L. No. 87-849, §1(a), Oct. 23, 1962, 76 Stat. 1122, and amended Pub. L. No. 101-194, title IV, §404, Nov. 30, 1989, 103 Stat. 1750; Pub. L. No. 101-280, §5(c), May 4, 1990, 104 Stat. 159.)

§206. Exemption of retired officers of the uniformed services

Sections 203 and 205 of this title shall not apply to a retired officer of the uniformed services of the United States while not on active duty and not otherwise an officer or employee of the United States, or to any person specially excepted by Act of Congress.
(Added Pub. L. No. 87-849, §1(a), Oct. 23, 1962, 76 Stat. 1123.)

§207. Restrictions on former officers, employees, and elected officials of the executive and legislative branches

(a) Restrictions on All Officers and Employees of the Executive Branch and Certain Other Agencies.

(1) Permanent restrictions on representation on particular matters.-Any person who is an officer or employee (including any special Government employee) of the executive branch of the United States (including any independent agency of the United States), or of the District of Columbia, and who, after the termination of his or her service or employment with the United States or the District of Columbia, knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the United States or the District of Columbia, on behalf of any other person (except the United States or the District of Columbia) in connection with a particular matter-

(A) in which the United States or the District of Columbia is a party or has a direct and substantial interest,

(B) in which the person participated personally and substantially as such officer or employee, and

(C) which involved a specific party or specific parties at the time of such participation,

shall be punished as provided in section 216 of this title.

(2) Two-year restrictions concerning particular matters under official responsibility. Any person subject to the restrictions contained in paragraph (1) who, within 2 years after the termination of his or her service or employment with the United States or the District of Columbia, knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the United States or the District of Columbia, on behalf of any other person (except the United States or the District of Columbia), in connection with a particular matter-

(A) in which the United States or the District of Columbia is a party or has a direct and substantial interest,

(B) which such person knows or reasonably should know was actually pending under his or her official responsibility as such officer or employee within a period of 1 year before the termination of his or her service or employment with the United States or the District of Columbia, and

(C) which involved a specific party or specific parties at the time it was so pending,

shall be punished as provided in section 216 of this title.

(3) Clarification of Restrictions. The restrictions contained in paragraphs (1) and (2) shall apply-

(A) in the case of an officer or employee of the executive branch of the United States (including any independent agency), only with respect to communications to or appearances before any officer or employee of any department, agency, court, or court-martial of the United States on behalf of any other person (except the United States), and only with respect to a matter in which the United States is a party or has a direct and substantial interest; and

(B) in the case of an officer or employee of the District of Columbia, only with respect to communications to or appearances before any officer or employee of any department, agency, or court of the District of Columbia on behalf of any other person (except the District of Columbia), and only with respect to a matter in which the District of Columbia is a party or has a direct and substantial interest.

(b) One-Year Restrictions on Aiding or Advising.

(1) In general. Any person who is a former officer or employee of the executive branch of the United States (including any independent agency) and is subject to the restrictions contained in subsection (a)(1), or any person who is a former officer or employee of the legislative branch or a former Member of Congress, who personally and substantially participated in any ongoing trade or treaty negotiation on behalf of the United States within the 1-year period preceding the date on which his or her service or employment with the United States terminated, and who had access to information concerning such trade or treaty negotiation which is exempt from disclosure under section 552 of title 5, which is so designated by the appropriate department or agency, and which the person knew or should have known was so designated, shall not, on the basis of

that information, knowingly represent, aid, or advise any other person (except the United States) concerning such ongoing trade or treaty negotiation for a period of 1 year after his or her service or employment with the United States terminates. Any person who violates this subsection shall be punished as provided in section 216 of this title.

(2) Definition. For purposes of this paragraph-

(A) the term "trade negotiation" means negotiations which the President determines to undertake to enter into a trade agreement pursuant to section 1102 of the Omnibus Trade and Competitiveness Act of 1988, and does not include any action taken before that determination is made; and

(B) the term "treaty" means an international agreement made by the President that requires the advice and consent of the Senate.

(c) One-Year Restrictions on Certain Senior Personnel of the Executive Branch and Independent Agencies.

(1) Restrictions. In addition to the restrictions set forth in subsections (a) and (b), any person who is an officer or employee (including any special Government employee) of the executive branch of the United States (including an independent agency), who is referred to in paragraph (2), and who, within 1 year after the termination of his or her service or employment as such officer or employee, knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of the department or agency in which such person served within 1 year before such termination, on behalf of any other person (except the United States), in connection with any matter on which such person seeks official action by any officer or employee of such department or agency, shall be punished as provided in section 216 of this title.

(2) Persons to whom restrictions apply. (A) Paragraph (1) shall apply to a person (other than a person subject to the restrictions of subsection (d))-

(i) employed at a rate of pay specified in or fixed according to subchapter II of chapter 53 of title 5,

(ii) employed in a position which is not referred to in clause (i) and for which the basic rate of pay, exclusive of any locality-based pay adjustment under section 5302 of title 5 (or any comparable adjustment pursuant to interim authority of the President), is equal to or greater than the rate of basic pay payable for level V of the Executive Schedule;[2]

(iii) appointed by the President to a position under section 105(a)(2)(B) of title 3 or by the Vice President to a position under section 106(a)(1)(B) of title 3, or

(iv) employed in a position which is held by an active duty commissioned officer of the uniformed services who is serving in a grade or rank for which the pay grade (as specified in section 201 of title 37) is pay grade O-7 or above.

(B) Paragraph (1) shall not apply to a special Government employee who serves less than 60 days in the 1-year period before his or her service or employment as such employee terminates.

(C) At the request of a department or agency, the Director of the Office of Government Ethics may waive the restrictions contained in paragraph (1) with respect to any position, or category of positions, referred to in clause (ii) or (iv) of subparagraph (A), in such department or agency if the Director determines that-

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[2] So in original. The semicolon probably should be a comma.

(i) the imposition of the restrictions with respect to such position or positions would create an undue hardship on the department or agency in obtaining qualified personnel to fill such position or positions, and

(ii) granting the waiver would not create the potential for use of undue influence or unfair advantage.

(d) Restrictions on Very Senior Personnel of the Executive Branch and Independent Agencies.

(1) Restrictions. In addition to the restrictions set forth in subsections (a) and (b), any person who-

(A) serves in the position of Vice President of the United States,

(B) is employed in a position in the executive branch of the United States (including any independent agency) at a rate of pay payable for level I of the Executive Schedule or employed in a position in the Executive Office of the President at a rate of pay payable for level II of the Executive Schedule, or

(C) is appointed by the President to a position under section 105(a)(2)(A) of title 3 or by the Vice President to a position under section 106(a)(1)(A) of title 3,

and who, within 1 year after the termination of that person's service in that position, knowingly makes, with the intent to influence, any communication to or appearance before any person described in paragraph (2), on behalf of any other person (except the United States), in connection with any matter on which such person seeks official action by any officer or employee of the executive branch of the United States, shall be punished as provided in section 216 of this title.

(2) Persons who may not be contacted. The persons referred to in paragraph (1) with respect to appearances or communications by a person in a position described in subparagraph (A), (B), or (C) of paragraph (1) are-

(A) any officer or employee of any department or agency in which such person served in such position within a period of 1 year before such person's service or employment with the United States Government terminated, and

(B) any person appointed to a position in the executive branch which is listed in section 5312, 5313, 5314, 5315, or 5316 of title 5.

(e) Restrictions on Members of Congress and Officers and Employees of the Legislative Branch.

(1) Members of Congress and elected officers. (A) Any person who is a Member of Congress or an elected officer of either House of Congress and who, within 1 year after that person leaves office, knowingly makes, with the intent to influence, any communication to or appearance before any of the persons described in subparagraph (B) or (C), on behalf of any other person (except the United States) in connection with any matter on which such former Member of Congress or elected officer seeks action by a Member, officer, or employee of either House of Congress, in his or her official capacity, shall be punished as provided in section 216 of this title.

(B) The persons referred to in subparagraph (A) with respect to appearances or communications by a former Member of Congress are any Member, officer, or employee of either House of Congress, and any employee of any other legislative office of the Congress.

(C) The persons referred to in subparagraph (A) with respect to appearances or communications by a former elected officer are any Member, officer, or employee of the House of Congress in which the elected officer served.

(2) Personal staff. (A) Any person who is an employee of a Senator or an employee of a Member of the House of Representatives and who, within 1 year after the termination of that employment, knowingly makes, with the intent to influence, any communication to or appearance before any of the persons described in subparagraph (B), on behalf of any other person (except the United States) in connection with any matter on which such former employee seeks action by a Member, officer, or employee of either House of Congress, in his or her official capacity, shall be punished as provided in section 216 of this title.

(B) The persons referred to in subparagraph (A) with respect to appearances or communications by a person who is a former employee are the following:

(i) the Senator or Member of the House of Representatives for whom that person was an employee; and

(ii) any employee of that Senator or Member of the House of Representatives.

(3) Committee staff. Any person who is an employee of a committee of Congress and who, within 1 year after the termination of that person's employment on such committee, knowingly makes, with the intent to influence, any communication to or appearance before any person who is a Member or an employee of that committee or who was a Member of the committee in the year immediately prior to the termination of such person's employment by the committee, on behalf of any other person (except the United States) in connection with any matter on which such former employee seeks action by a Member, officer, or employee of either House of Congress, in his or her official capacity, shall be punished as provided in section 216 of this title.

(4) Leadership staff. (A) Any person who is an employee on the leadership staff of the House of Representatives or an employee on the leadership staff of the Senate and who, within 1 year after the termination of that person's employment on such staff, knowingly makes, with the intent to influence, any communication to or appearance before any of the persons described in subparagraph (B), on behalf of any other person (except the United States) in connection with any matter on which such former employee seeks action by a Member, officer, or employee of either House of Congress, in his or her official capacity, shall be punished as provided in section 216 of this title.

(B) The persons referred to in subparagraph (A) with respect to appearances or communications by a former employee are the following:

(i) in the case of a former employee on the leadership staff of the House of Representatives, those persons are any Member of the leadership of the House of Representatives and any employee on the leadership staff of the House of Representatives; and

(ii) in the case of a former employee on the leadership staff of the Senate, those persons are any Member of the leadership of the Senate and any employee on the leadership staff of the Senate.

(5) Other legislative offices. (A) Any person who is an employee of any other legislative office of the Congress and who, within 1 year after the termination of

that person's employment in such office, knowingly makes, with the intent to influence, any communication to or appearance before any of the persons described in subparagraph (B), on behalf of any other person (except the United States) in connection with any matter on which such former employee seeks action by any officer or employee of such office, in his or her official capacity, shall be punished as provided in section 216 of this title.

(B) The persons referred to in subparagraph (A) with respect to appearances or communications by a former employee are the employees and officers of the former legislative office of the Congress of the former employee.

(6) Limitation on restrictions. (A) The restrictions contained in paragraphs (2), (3), and (4) apply only to acts by a former employee who, for at least 60 days, in the aggregate, during the 1-year period before that former employee's service as such employee terminated, was paid a rate of basic pay equal to or greater than an amount which is 75 percent of the basic rate of pay payable for a Member of the House of Congress in which such employee was employed.

(B) The restrictions contained in paragraph (5) apply only to acts by a former employee who, for at least 60 days, in the aggregate, during the 1-year period before that former employee's service as such employee terminated, was employed in a position for which the rate of basic pay, exclusive of any locality-based pay adjustment under section 5302 of title 5 (or any comparable adjustment pursuant to interim authority of the President), is equal to or greater than the basic rate of pay payable for level V of the Executive Schedule.

(7) Definitions. As used in this subsection-

(A) the term "committee of Congress" includes standing committees, joint committees, and select committees;

(B) a person is an employee of a House of Congress if that person is an employee of the Senate or an employee of the House of Representatives;

(C) the term "employee of the House of Representatives" means an employee of a Member of the House of Representatives, an employee of a committee of the House of Representatives, an employee of a joint committee of the Congress whose pay is disbursed by the Clerk of the House of Representatives, and an employee on the leadership staff of the House of Representatives;

(D) the term "employee of the Senate" means an employee of a Senator, an employee of a committee of the Senate, an employee of a joint committee of the Congress whose pay is disbursed by the Secretary of the Senate, and an employee on the leadership staff of the Senate;

(E) a person is an employee of a Member of the House of Representatives if that person is an employee of a Member of the House of Representatives under the clerk hire allowance;

(F) a person is an employee of a Senator if that person is an employee in a position in the office of a Senator;

(G) the term "employee of any other legislative office of the Congress" means an officer or employee of the Architect of the Capitol, the United States Botanic Garden, the General Accounting Office, the Government Printing Office, the Library of Congress, the Office of Technology Assessment, the Congressional Budget Office, the Copyright

Royalty Tribunal, the United States Capitol Police, and any other agency, entity, or office in the legislative branch not covered by paragraph (1), (2), (3), or (4) of this subsection;

(H) the term "employee on the leadership staff of the House of Representatives" means an employee of the office of a Member of the leadership of the House of Representatives described in subparagraph (L), and any elected minority employee of the House of Representatives;

(I) the term "employee on the leadership staff of the Senate" means an employee of the office of a Member of the leadership of the Senate described in subparagraph (M);

(J) the term "Member of Congress" means a Senator or a Member of the House of Representatives;

(K) the term "Member of the House of Representatives" means a Representative in, or a Delegate or Resident Commissioner to, the Congress;

(L) the term "Member of the leadership of the House of Representatives" means the Speaker, majority leader, minority leader, majority whip, minority whip, chief deputy majority whip, chief deputy minority whip, chairman of the Democratic Steering Committee, chairman and vice chairman of the Democratic Caucus, chairman, vice chairman, and secretary of the Republican Conference, chairman of the Republican Research Committee, and chairman of the Republican Policy Committee, of the House of Representatives (or any similar position created on or after the effective date set forth in section 102(a) of the Ethics Reform Act of 1989);

(M) the term "Member of the leadership of the Senate" means the Vice President, and the President pro tempore, Deputy President pro tempore, majority leader, minority leader, majority whip, minority whip, chairman and secretary of the Conference of the Majority, chairman and secretary of the Conference of the Minority, chairman and co-chairman of the Majority Policy Committee, and chairman of the Minority Policy Committee, of the Senate (or any similar position created on or after the effective date set forth in section 102(a) of the Ethics Reform Act of 1989).

(f) Restrictions Relating to Foreign Entities.

(1) Restrictions. Any person who is subject to the restrictions contained in subsection (c), (d), or (e) and who knowingly, within 1 year after leaving the position, office, or employment referred to in such subsection-

(A) represents a foreign entity before any officer or employee of any department or agency of the United States with the intent to influence a decision of such officer or employee in carrying out his or her official duties, or

(B) aids or advises a foreign entity with the intent to influence a decision of any officer or employee of any department or agency of the United States, in carrying out his or her official duties,

shall be punished as provided in section 216 of this title.

(2) Definition. For purposes of this subsection, the term "foreign entity" means the government of a foreign country as defined in section 1(e) of the Foreign Agents Registration Act of 1938, as amended, or a foreign political party as defined in section 1(f) of that Act.

(g) Special Rules for Detailees. For purposes of this section, a person who is detailed from one department, agency, or other entity to another department, agency, or other entity shall, during the period such person is detailed, be deemed to be an officer or employee of both departments, agencies, or such entities.

(h) Designations of Separate Statutory Agencies and Bureaus.

(1) Designations. For purposes of subsection (c) and except as provided in paragraph (2), whenever the Director of the Office of Government Ethics determines that an agency or bureau within a department or agency in the executive branch exercises functions which are distinct and separate from the remaining functions of the department or agency and that there exists no potential for use of undue influence or unfair advantage based on past Government service, the Director shall by rule designate such agency or bureau as a separate department or agency. On an annual basis the Director of the Office of Government Ethics shall review the designations and determinations made under this subparagraph and, in consultation with the department or agency concerned, make such additions and deletions as are necessary. Departments and agencies shall cooperate to the fullest extent with the Director of the Office of Government Ethics in the exercise of his or her responsibilities under this paragraph.

(2) Inapplicability of designations. No agency or bureau within the Executive Office of the President may be designated under paragraph (1) as a separate department or agency. No designation under paragraph (1) shall apply to persons referred to in subsection (c)(2)(A)(i) or (iii).

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(i) Definitions. For purposes of this section-

(1) the term "officer or employee", when used to describe the person to whom a communication is made or before whom an appearance is made, with the intent to influence, shall include-

(A) in subsections (a), (c), and (d), the President and the Vice President; and

(B) in subsection (f), the President, the Vice President, and Members of Congress;

(2) the term "participated" means an action taken as an officer or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other such action; and

(3) the term "particular matter" includes any investigation, application, request for a ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding.

(j) Exceptions.

(1) Official government duties. The restrictions contained in this section shall not apply to acts done in carrying out official duties on behalf of the United States or the District of Columbia or as an elected official of a State or local government.

(2) State and local governments and institutions, hospitals, and organizations. The restrictions contained in subsections (c), (d), and (e) shall not apply to acts done in carrying out official duties as an employee of-

(A) an agency or instrumentality of a State or local government if the appearance, communication, or representation is on behalf of such government, or

(B) an accredited, degree-granting institution of higher education, as defined in section 1201(a) of the Higher Education Act of 1965, or a hospital or medical research organization, exempted and defined under section 501(c)(3) of the Internal Revenue Code of 1986, if the appearance, communication, or representation is on behalf of such institution, hospital, or organization.

(3) International organizations. The restrictions contained in this section shall not apply to an appearance or communication on behalf of, or advice or aid to, an international organization in which the United States participates, if the Secretary of State certifies in advance that such activity is in the interests of the United States.

(4) Special knowledge. The restrictions contained in subsections (c), (d), and (e) shall not prevent an individual from making or providing a statement, which is based on the individual's own special knowledge in the particular area that is the subject of the statement, if no compensation is thereby received.

(5) Exception for scientific or technological information. The restrictions contained in subsections (a), (c), and (d) shall not apply with respect to the making of communications solely for the purpose of furnishing scientific or technological information, if such communications are made under procedures acceptable to the department or agency concerned or if the head of the department or agency concerned with the particular matter, in consultation with the Director of the Office of Government Ethics, makes a certification, published in the Federal Register, that the former officer or employee has outstanding qualifications in a scientific, technological, or other technical discipline, and is acting with respect to a particular matter which requires such qualifications, and that the national interest would be served by the participation of the former officer or employee. For purposes of this paragraph, the term "officer or employee" includes the Vice President.

(6) Exception for testimony. Nothing in this section shall prevent an individual from giving testimony under oath, or from making statements required to be made under penalty of perjury. Notwithstanding the preceding sentence-

(A) a former officer or employee of the executive branch of the United States (including any independent agency) who is subject to the restrictions contained in subsection (a)(1) with respect to a particular matter may not, except pursuant to court order, serve as an expert witness for any other person (except the United States) in that matter; and

(B) a former officer or employee of the District of Columbia who is subject to the restrictions contained in subsection (a)(1) with respect to a particular matter may not, except pursuant to court order, serve as an expert witness for any other person (except the District of Columbia) in that matter.

(k)(1)(A) The President may grant a waiver of a restriction imposed by this section to any officer or employee described in paragraph (2) if the President determines and certifies in writing that it is in the public interest to grant the waiver and that the services of the officer or employee are critically needed for the benefit of the Federal Government. Not more than 25 officers and employees currently employed by the Federal Government at any one time may have been granted waivers under this paragraph.

(B)(i) A waiver granted under this paragraph to any person shall apply only with respect to activities engaged in by that person after that person's Federal Government employment is terminated and only to that person's employment at a Government-owned, contractor operated entity with which the person served as an officer or employee immediately before the person's Federal Government employment began.

(ii) Notwithstanding clause (i), a waiver granted under this paragraph to any person who was an officer or employee of Lawrence Livermore National Laboratory, Los Alamos National Laboratory, or Sandia National Laboratory immediately before the person's Federal Government employment began shall apply to that person's employment by any such national laboratory after the person's employment by the Federal Government is terminated.

(2) Waivers under paragraph (1) may be granted only to civilian officers and employees of the executive branch, other than officers and employees in the Executive Office of the President.

(3) A certification under paragraph (1) shall take effect upon its publication in the Federal Register and shall identify-

(A) the officer or employee covered by the waiver by name and by position, and

(B) the reasons for granting the waiver.

A copy of the certification shall also be provided to the Director of the Office of Government Ethics.

(4) The President may not delegate the authority provided by this subsection.

(5)(A) Each person granted a waiver under this subsection shall prepare reports, in accordance with subparagraph (B), stating whether the person has engaged in activities otherwise prohibited by this section for each six-month period described in subparagraph (B), and if so, what those activities were.

(B) A report under subparagraph (A) shall cover each six-month period beginning on the date of the termination of the person's Federal Government employment (with respect to which the waiver under this subsection was granted) and ending two years after that date. Such report shall be filed with the President and the Director of the Office of Government Ethics not later than 60 days after the end of the six-month period covered by the report. All reports filed with the Director under this paragraph shall be made available for public inspection and copying.

(C) If a person fails to file any report in accordance with subparagraphs (A) and (B), the President shall revoke the waiver and shall notify the person of the revocation. The revocation shall take effect upon the person's receipt of the notification and shall remain in effect until the report is filed.

(D) Any person who is granted a waiver under this subsection shall be ineligible for appointment in the civil service unless all reports required of such person by subparagraphs (A) and (B) have been filed.

(E) As used in this subsection, the term "civil service" has the meaning given that term in section 2101 of title 5.

(Added Pub. L. No. 87-849, §1(a), Oct. 23, 1962, 76 Stat. 1123, and amended Pub. L. No. 95-521, title V, §501(a), Oct. 26, 1978, 92 Stat. 1864; Pub. L. No. 96-28, June 22, 1979, 93 Stat. 76; Pub. L. No. 101-189, div. A, title VIII, §814(d)(2), Nov. 29, 1989, 103 Stat. 1499; Pub. L. No. 101-194, title I, §101(a), Nov. 30, 1989, 103 Stat. 1716; Pub. L. No. 101-280, §§2(a), 5(d), May 4, 1990, 104 Stat. 149, 159; Pub. L. No. 101-509, title V, §529 [title I, §101(b)(8)(A)], Nov. 5, 1990, 104 Stat. 1427, 1440; Pub. L. No. 102-25, title VII, §705(a), Apr. 6, 1991, 105 Stat. 120; Pub. L. No. 102-190, div. C, title XXXI, §3138(a), Dec. 5, 1991, 105 Stat. 1579.)

§208. Acts affecting a personal financial interest

(a) Except as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States, a Federal Reserve bank director, officer, or employee, or an officer or employee of the District of Columbia, including a special Government employee, participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, general partner, organization in which he is serving as officer, director, trustee, general partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest-
Shall be subject to the penalties set forth in section 216 of this title.

(b) Subsection (a) shall not apply-

(1) if the officer or employee first advises the Government official responsible for appointment to his or her position of the nature and circumstances of the judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter and makes full disclosure of the financial interest and receives in advance a written determination made by such official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee;

(2) if, by regulation issued by the Director of the Office of Government Ethics, applicable to all or a portion of all officers and employees covered by this section, and published in the Federal Register, the financial interest has been exempted from the requirements of subsection (a) as being too remote or too inconsequential to affect the integrity of the services of the Government officers or employees to which such regulation applies;

(3) in the case of a special Government employee serving on an advisory committee within the meaning of the Federal Advisory Committee Act (including an individual being considered for an appointment to such a position), the official responsible for the employee's appointment, after review of the financial disclosure report filed by the individual pursuant to the Ethics in Government Act of 1978, certifies in writing that the need for the individual's services outweighs the potential for a conflict of interest created by the financial interest involved; or

(4) the financial interest that would be affected by the particular matter involved is that resulting solely from the interest of the officer or employee, or his or her spouse or minor child, in birthrights-

(A) in an Indian tribe, band, nation, or other organized group or community, including any Alaska Native village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians,

(B) in an Indian allotment the title to which is held in trust by the United States or which is inalienable by the allottee without the consent of the United States, or

(C) in an Indian claims fund held in trust or administered by the United States,

if the particular matter does not involve the Indian allotment or claims fund or the Indian tribe, band, nation, organized group or community, or Alaska Native village corporation as a specific party or parties.

(c)(1) For the purpose of paragraph (1) of subsection (b), in the case of class A and B directors of Federal Reserve Banks, the Board of Governors of the Federal Reserve System shall be deemed to be the Government official responsible for appointment.

(2) The potential availability of an exemption under any particular paragraph of subsection (b) does not preclude an exemption being granted pursuant to another paragraph of subsection (b).

(d)(1) Upon request, a copy of any determination granting an exemption under subsection (b)(1) or (b)(3) shall be made available to the public by the agency granting the exemption pursuant to the procedures set forth in section 105 of the Ethics in Government Act of 1978. In makingsuchdeterminationavailable, the agency may withhold from disclosure any information contained in the determination that would be exempt from disclosure under section 552 of title 5. For purposes of determinations under subsection (b)(3), the information describing each financial interest shall be no more extensive than that required of the individual in his or her financial disclosure report under the Ethics in Government Act of 1978.

(2) The Office of Government Ethics, after consultation with the Attorney General, shall issue uniform regulations for the issuance of waivers and exemptions under subsection (b) which shall-

(A) list and describe exemptions; and

(B) provide guidance with respect to the types of interests that are not so substantial as to be deemed likely to affect the integrity of the services the Government may expect from the employee.

(Added Pub. L. No. 87-849, §1(a), Oct. 23, 1962, 76 Stat. 1124, and amended Pub. L. No. 95-188, title II, §205, Nov. 16, 1977, 91 Stat. 1388; Pub. L. No. 101-194, title IV, §405, Nov. 30, 1989, 103 Stat. 1751; Pub. L. No. 101-280, §5(e), May 4, 1990, 104 Stat. 159.)

§209. Salary of Government officials and employees payable only by United States

(a) Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, from any source other than the Government of the United States, except as may be contributed out of the treasury of any State, county, or municipality; or

Whoever, whether an individual, partnership, association, corporation, or other organization pays, or makes any contribution to, or in any way supplements the salary of, any such officer or employee under circumstances which would make its receipt a violation of this subsection-

Shall be subject to the penalties set forth in section 216 of this title.

(b) Nothing herein prevents an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States, or of the District of Columbia, from continuing to participate in a bona fide pension, retirement, group life, health or accident insurance, profit-sharing, stock bonus, or other employee welfare or benefit plan maintained by a former employer.

(c) This section does not apply to a special Government employee or to an officer or employee of the Government serving without compensation, whether or not he is a special Government employee, or to any person paying, contributing to, or supplementing his salary as such.

(d) This section does not prohibit payment or acceptance of contributions, awards, or other expenses under the terms of the chapter 41 of title 5.

(e) This section does not prohibit the payment of actual relocation expenses incident to participation, or the acceptance of same by a participant in an executive exchange or fellowship program in an executive agency: Provided, That such program has been established by statute or Executive order of the President, offers appointments not to exceed three hundred and sixty-five days, and permits no extensions in excess of ninety additional days or, in the case of participants in overseas assignments, in excess of three hundred and sixty-five days.

(f) This section does not prohibit acceptance or receipt, by any officer or employee injured during the commission of an offense described in section 351 or 1751 of this title, of contributions or payments from an organization which is described in section 501(c)(3) of the Internal Revenue Code of 1986 and which is exempt from taxation under section 501(a) of such Code.

(Added Pub. L. No. 87-849, §1(a), Oct. 23, 1962, 76 Stat. 1125, and amended Pub. L. No. 96-174, Dec. 29, 1979, 93 Stat. 1288; Pub. L. No. 97-171, Apr. 13, 1982, 96 Stat. 67; Pub. L. No. 99-514, §2, Oct. 22, 1986, 100 Stat. 2095; Pub. L. No. 99-646, §70, Nov. 10, 1986, 100 Stat. 3617; Pub. L. No. 101-194, title IV, §406, Nov. 30, 1989, 103 Stat. 1753; Pub. L. No. 101-647, title XXXV, §3510, Nov. 29, 1990, 104 Stat. 4922.)

§210. Offer to procure appointive public office

Whoever pays or offers or promises any money or thing of value, to any person, firm, or corporation in consideration of the use or promise to use any influence to procure any appointive office or place under the United States for any person, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(June 25, 1948, ch. 645, 62 Stat. 694, §210, formerly §214, renumbered Oct. 23, 1962, Pub. L. No. 87-849, §1(b), 76 Stat. 1125.)

§211. Acceptance or solicitation to obtain appointive public office

Whoever solicits or receives, either as a political contribution, or for personal emolument, any money or thing of value, in consideration of the promise of support or use of influence in obtaining for any person any appointive office or place under the United States, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Whoever solicits or receives any thing of value in consideration of aiding a person to obtain employment under the United States either by referring his name to an executive department or agency of the United States or by requiring the payment of a fee because such person has secured such employment shall be fined not more than $1,000, or imprisoned not more than one year, or both. This section shall not apply to such services rendered by an employment agency pursuant to the written request of an executive department or agency of the United States.

(June 25, 1948, ch. 645, 62 Stat. 694, §211, formerly §215, amended Sept. 13, 1951, ch. 380, 65 Stat. 320, and renumbered Oct. 23, 1962, Pub. L. No. 87-849, §1(b), 76 Stat. 1125.)

§212. Offer of loan or gratuity to bank examiner

Whoever, being an officer, director or employee of a financial institution which is a member of the Federal Reserve System, or the deposits of which are insured by the Federal Deposit Insurance Corporation, or which is a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978), or which is an organization operating under section 25 or section 25(a) of the Federal Reserve Act, or of any National Agricultural Credit Corporation, or of any Farm Credit Bank, bank for cooperatives, production credit association, Federal land bank association, agricultural credit association, Federal land credit association, service organization chartered under section 4.26 of the Farm Credit Act of 1971, the Farm Credit System Financial Assistance Corporation, the Federal Agricultural Mortgage Credit Corporation, the Federal Farm Credit Banks Funding Corporation, the National Consumer Cooperative Bank, or other institution subject to examination by a Farm Credit Administration examiner, or of any small business investment company, makes or grants any loan or gratuity, to any examiner or assistant examiner who examines or has authority to examine such bank, branch, agency, organization, corporation, or institution, shall be fined not more than $5,000 or imprisoned not more than one year, or both; and may be fined a further sum equal to the money so loaned or gratuity given.

The provisions of this section and section 218 of this title shall apply to all public examiners and assistant examiners who examine member banks of the Federal Reserve System, insured financial institutions, branches or agencies of foreign banks (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978), organizations operating under section 25 or section 25(a) of the Federal Reserve Act, or National Agricultural Credit Corporations, whether appointed by the Comptroller of the Currency, by the Board of Governors of the Federal Reserve System, by a Federal Reserve Agent, by a Federal Reserve bank, by the Federal Deposit Insurance Corporation, by the Office of Thrift Supervision, or by the Federal Housing Finance Board, or appointed or elected under the laws of any state; but shall not apply to private examiners or assistant examiners employed only by a clearinghouse association or by the directors of a bank.

(June 25, 1948, ch. 645, 62 Stat. 694, §212, formerly §217, amended Aug. 21, 1958, Pub. L. No. 85-699, title VII, §701(a), 72 Stat. 698; Aug. 18, 1959, Pub. L. No. 86-168, title I, §104(h), 73 Stat. 387, and renumbered Oct. 23, 1962, Pub. L. No. 87-849, §1(d), 76 Stat. 1125; Aug. 9, 1989, Pub. L. No. 101-73, title IX, §962(a)(1), 103 Stat. 501; Nov. 29, 1990, Pub. L. No. 101-647, title XXV, §2597(b), 104 Stat. 4908.)

§213. Acceptance of loan or gratuity by bank examiner

Whoever, being an examiner or assistant examiner of member banks of the Federal Reserve System, financial institutions the deposits of which are insured by the Federal Deposit Insurance Corporation, which are branches or agencies of foreign banks (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978), or which are organizations operating under section 25 or section 25(a) of the Federal Reserve Act, or a farm credit examiner or examiner of National Agricultural Credit Corporations, or an examiner of small business investment companies, accepts a loan or gratuity from any bank, branch, agency, corporation, association or organization examined by him or from any person connected herewith, shall be fined not more than $5,000 or imprisoned not more than one year, or both; and may be fined a further sum equal to the money so loaned or gratuity given, and shall be disqualified from holding office as such examiner.

(June 25, 1948, ch. 645, 62 Stat. 695, §213, formerly §218, amended Aug. 21, 1958, Pub. L. No. 85-699, title VII, §701(b), 72 Stat. 698, and renumbered Oct. 23, 1962, Pub. L. No. 87-849, §1(d), 76 Stat. 1125; Aug. 9, 1989, Pub. L. No. 101-73, title IX, §962(a)(2), 103 Stat. 502; Nov. 29, 1990, Pub. L. No. 101-647, title XXV, §2597(c), 104 Stat. 4909.)

§214. Offer for procurement of Federal Reserve bank loan and discount of commercial paper

Whoever stipulates for or gives or receives, or consents or agrees to give or receive, any fee, commission, bonus, or thing of value for procuring or endeavoring to procure from any Federal Reserve bank any advance, loan, or extension of credit or discount or purchase of any obligation or commitment with respect thereto, either directly from such Federal Reserve bank or indirectly through any financing institution, unless such fee, commission, bonus, or thing of value and all material facts with respect to the arrangement or understanding therefor shall be disclosed in writing in the application or request for such advance, loan, extension of credit, discount, purchase, or commitment, shall be fined not more than $5,000 or imprisoned not more than one year, or both.

(June 25, 1948, ch. 645, 62 Stat. 695, §214, formerly §219, renumbered Oct. 23, 1962, Pub. L. No. 87-849, §1(d), 76 Stat. 1125.)

§215. Receipt of commissions or gifts for procuring loans

(a) Whoever--

(1) corruptly gives, offers, or promises anything of value to any person, with intent to influence or reward an officer, director, employee, agent, or attorney of

a financial institution in connection with any business or transaction of such institution; or

(2) as an officer, director, employee, agent, or attorney of a financial institution, corruptly solicits or demands for the benefit of any person, or corruptly accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business or transaction of such institution;

shall be fined not more than $1,000,000 or three times the value of the thing given, offered, promised, solicited, demanded, accepted, or agreed to be accepted, whichever is greater, or imprisoned not more than 30 years, or both, but if the value of the thing given, offered, promised, solicited, demanded, accepted, or agreed to be accepted does not exceed $100, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

[(b) Transferred]

(c) This section shall not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

(d) Federal agencies with responsibility for regulating a financial institution shall jointly establish such guidelines as are appropriate to assist an officer, director, employee, agent, or attorney of a financial institution to comply with this section. Such agencies shall make such guidelines available to the public.

(June 25, 1948, ch. 645, 62 Stat. 695, §215, formerly §220, amended Sept. 21, 1950, ch. 967, §4, 64 Stat. 894, and renumbered Oct. 23, 1962, Pub. L. No. 87-849, §1(d), 76 Stat. 1125; Oct. 12, 1984, Pub. L. No. 98-473, title II, §1107(a), 98 Stat. 2145; Aug. 4, 1986, Pub. L. No. 99-370, §2, 100 Stat. 779; Aug. 9, 1989, Pub. L. No. 101-73, title IX, §§961(a), 962(e)(1), 103 Stat. 499, 503; Nov. 29, 1990, Pub. L. No. 101-647, title XXV, §2504(a), 104 Stat. 4861.)

§216. Penalties and injunctions

(a) The punishment for an offense under section 203, 204, 205, 207, 208, or 209 of this title is the following:

(1) Whoever engages in the conduct constituting the offense shall be imprisoned for not more than one year or fined in the amount set forth in this title, or both.

(2) Whoever willfully engages in the conduct constituting the offense shall be imprisoned for not more than five years or fined in the amount set forth in this title, or both.

(b) The Attorney General may bring a civil action in the appropriate United States district court against any person who engages in conduct constituting an offense under section 203, 204, 205, 207, 208, or 209 of this title and, upon proof of such conduct by a preponderance of the evidence, such person shall be subject to a civil penalty of not more than $50,000 for each violation or the amount of compensation which the person received or offered for the prohibited conduct, whichever amount is greater. The imposition of a civil penalty under this subsection does not preclude any other criminal or civil statutory, common law, or administrative remedy, which is available by law to the United States or any other person.

(c) If the Attorney General has reason to believe that a person is engaging in conduct constituting an offense under section 203, 204, 205, 207, 208, or 209 of this title, the Attorney General may petition an appropriate United States district court for an order prohibiting that person from engaging in such conduct. The court may issue an order prohibiting that person from engaging in such conduct if the court finds that the conduct constitutes such an offense. The filing of a petition under this section does not preclude any other remedy which is available by law to the United States or any other person.
(Added Pub. L. No. 101-194, title IV, §407(a), Nov. 30, 1989, 103 Stat. 1753, and amended Pub. L. No. 101-280, §5(f), May 4, 1990, 104 Stat. 159.)

§217. Acceptance of consideration for adjustment of farm indebtedness

Whoever, being an officer or employee of, or person acting for the United States or any agency thereof, accepts any fee, commission, gift, or other consideration in connection with the compromise, adjustment, or cancellation of any farm indebtedness as provided by sections 1150, 1150a, and 1150b of Title 12, shall be fined not more than $1,000 or imprisoned not more than one year, or both.
(June 25, 1948, ch. 645, 62 Stat. 696, §217, formerly §222, renumbered Oct. 23, 1962, Pub. L. No. 87-849, §1(d), 76 Stat. 1125.)

§218. Voiding transactions in violation of chapter; recovery by the United States

In addition to any other remedies provided by law the President or, under regulations prescribed by him, the head of any department or agency involved, may declare void and rescind any contract, loan, grant, subsidy, license, right, permit, franchise, use, authority, privilege, benefit, certificate, ruling, decision, opinion, or rate schedule awarded, granted, paid, furnished, or published, or the performance of any service or transfer or delivery of any thing to, by or for any agency of the United States or officer or employee of the United States or person acting on behalf thereof, in relation to which there has been a final conviction for any violation of this chapter, and the United States shall be entitled to recover in addition to any penalty prescribed by law or in a contract the amount expended or the thing transferred or delivered on its behalf, or the reasonable value thereof.
(Added Pub. L. No. 87-849, §1(e), Oct. 23, 1962, 76 Stat. 1125.)

Executive Order 12,371
Principles of Ethical Conduct for Government Officers and Employees
3 CFR 306 (1991) Comp.

Executive Order 12731 of October 17, 1990

Principles of Ethical Conduct for Government Officers and Employees

By virtue of the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to establish fair and exacting standards of ethical conduct for all executive branch employees, it is hereby ordered that Executive Order 12674 of April 12, 1989, is henceforth modified to read as follows:

"EXECUTIVE ORDER

"________________________________

"PRINCIPLES OF ETHICAL CONDUCT FOR GOVERNMENT OFFICERS AND EMPLOYEES

"By virtue of the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to establish fair and exacting standards of ethical conduct for all executive branch employees, it is hereby ordered as follows:

"Part I—Principles of Ethical Conduct

"Section 101. *Principles of Ethical Conduct.* To ensure that every citizen can have complete confidence in the integrity of the Federal Government, each Federal employee shall respect and adhere to the fundamental principles of ethical service as implemented in regulations promulgated under sections 201 and 301 of this order:

"(a) Public service is a public trust, requiring employees to place loyalty to the Constitution, the laws, and ethical principles above private gain.

"(b) Employees shall not hold financial interests that conflict with the conscientious performance of duty.

"(c) Employees shall not engage in financial transactions using nonpublic Government information or allow the improper use of such information to further any private interest.

"(d) An employee shall not, except pursuant to such reasonable exceptions as are provided by regulation, solicit or accept any gift or other item of monetary value from any person or entity seeking official action from, doing business with, or conducting activities regulated by the employee's agency, or whose interests may be substantially affected by the performance or nonperformance of the employee's duties.

"(e) Employees shall put forth honest effort in the performance of their duties.

"(f) Employees shall make no unauthorized commitments or promises of any kind purporting to bind the Government.

"(g) Employees shall not use public office for private gain.

"(h) Employees shall act impartially and not give preferential treatment to any private organization or individual.

"(i) Employees shall protect and conserve Federal property and shall not use it for other than authorized activities.

"(j) Employees shall not engage in outside employment or activities, including seeking or negotiating for employment, that conflict with official Government duties and responsibilities.

"(k) Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities.

"(l) Employees shall satisfy in good faith their obligations as citizens, including all just financial obligations, especially those—such as Federal, State, or local taxes—that are imposed by law.

"(m) Employees shall adhere to all laws and regulations that provide equal opportunity for all Americans regardless of race, color, religion, sex, national origin, age, or handicap.

"(n) Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards promulgated pursuant to this order.

"Sec. 102. *Limitations on Outside Earned Income.*

"(a) No employee who is appointed by the President to a full-time noncareer position in the executive branch (including full-time noncareer employees in the White House Office, the Office of Policy Development, and the Office of Cabinet Affairs), shall receive any earned income for any outside employment or activity performed during that Presidential appointment.

"(b) The prohibition set forth in subsection (a) shall not apply to any full-time noncareer employees employed pursuant to 3 U.S.C. 105 and 3 U.S.C. 107(a) at salaries below the minimum rate of basic pay then paid for GS-9 of the General Schedule. Any outside employment must comply with relevant agency standards of conduct, including any requirements for approval of outside employment.

"Part II—Office of Government Ethics Authority

"Sec. 201. *The Office of Government Ethics.* The Office of Government Ethics shall be responsible for administering this order by:

"(a) Promulgating, in consultation with the Attorney General and the Office of Personnel Management, regulations that establish a single, comprehensive, and clear set of executive-branch standards of conduct that shall be objective, reasonable, and enforceable.

"(b) Developing, disseminating, and periodically updating an ethics manual for employees of the executive branch describing the applicable statutes, rules, decisions, and policies.

"(c) Promulgating, with the concurrence of the Attorney General, regulations interpreting the provisions of the post-employment statute, section 207 of title 18, United States Code; the general conflict-of-interest statute, section 208 of title 18, United States Code; and the statute prohibiting supplementation of salaries, section 209 of title 18, United States Code.

"(d) Promulgating, in consultation with the Attorney General and the Office of Personnel Management, regulations establishing a system of nonpublic (confidential) financial disclosure by executive branch employees to complement the system of public disclosure under the Ethics in Government Act of 1978. Such regulations shall include criteria to guide agencies in determining which employees shall submit these reports.

"(e) Ensuring that any implementing regulations issued by agencies under this order are consistent with and promulgated in accordance with this order.

"Sec. 202. *Executive Office of the President.* In that the agencies within the Executive Office of the President (EOP) currently exercise functions that are not distinct and separate from each other within the meaning and for the purposes of section 207(e) of title 18, United States Code, those agencies shall be treated as one agency under section 207(c) of title 18, United States Code.

"Part III—Agency Responsibilities

"**Sec. 301.** *Agency Responsibilities.* Each agency head is directed to:

"(a) Supplement, as necessary and appropriate, the comprehensive executive branch-wide regulations of the Office of Government Ethics, with regulations of special applicability to the particular functions and activities of that agency. Any supplementary agency regulations shall be prepared as addenda to the branch-wide regulations and promulgated jointly with the Office of Government Ethics, at the agency's expense, for inclusion in Title 5 of the Code of Federal Regulations.

"(b) Ensure the review by all employees of this order and regulations promulgated pursuant to the order.

"(c) Coordinate with the Office of Government Ethics in developing annual agency ethics training plans. Such training shall include mandatory annual briefings on ethics and standards of conduct for all employees appointed by the President, all employees in the Executive Office of the President, all officials required to file public or nonpublic financial disclosure reports, all employees who are contracting officers and procurement officials, and any other employees designated by the agency head.

"(d) Where practicable, consult formally or informally with the Office of Government Ethics prior to granting any exemption under section 208 of title 18, United States Code, and provide the Director of the Office of Government Ethics a copy of any exemption granted.

"(e) Ensure that the rank, responsibilities, authority, staffing, and resources of the Designated Agency Ethics Official are sufficient to ensure the effectiveness of the agency ethics program. Support should include the provision of a separate budget line item for ethics activities, where practicable.

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"Part IV—Delegations of Authority

"**Sec. 401.** *Delegations to Agency Heads.* Except in the case of the head of an agency, the authority of the President under sections 203(d), 205(e), and 208(b) of title 18, United States Code, to grant exemptions or approvals to individuals, is delegated to the head of the agency in which an individual requiring an exemption or approval is employed or to which the individual (or the committee, commission, board, or similar group employing the individual) is attached for purposes of administration.

"**Sec. 402.** *Delegations to the Counsel to the President.*

"(a) Except as provided in section 401, the authority of the President under sections 203(d), 205(e), and 208(b) of title 18, United States Code, to grant exemptions or approvals for Presidential appointees to committees, commissions, boards, or similar groups established by the President is delegated to the Counsel to the President.

"(b) The authority of the President under sections 203(d), 205(e), and 208(b) of title 18, United States Code, to grant exemptions or approvals for individuals appointed pursuant to 3 U.S.C. 105 and 3 U.S.C. 107(a), is delegated to the Counsel to the President.

"**Sec. 403.** *Delegation Regarding Civil Service.* The Office of Personnel Management and the Office of Government Ethics, as appropriate, are delegated the authority vested in the President by 5 U.S.C. 7301 to establish general regulations for the implementation of this Executive order.

"Part V—General Provisions

"Sec. 501. *Revocations.* The following Executive orders are hereby revoked:

"(a) Executive Order No. 11222 of May 8, 1965.

"(b) Executive Order No. 12565 of September 25, 1986.

"Sec. 502. *Savings Provision.*

"(a) All actions already taken by the President or by his delegates concerning matters affected by this order and in force when this order is issued, including any regulations issued under Executive Order 11222, Executive Order 12565, or statutory authority, shall, except as they are irreconcilable with the provisions of this order or terminate by operation of law or by Presidential action, remain in effect until properly amended, modified, or revoked pursuant to the authority conferred by this order or any regulations promulgated under this order. Notwithstanding anything in section 102 of this order, employees may carry out preexisting contractual obligations entered into before April 12, 1989.

"(b) Financial reports filed in confidence (pursuant to the authority of Executive Order No. 11222, 5 C.F.R. Part 735, and individual agency regulations) shall continue to be held in confidence.

"Sec. 503. *Definitions.* For purposes of this order, the term:

"(a) 'Contracting officers and procurement officials' means all such officers and officials as defined in the Office of Federal Procurement Policy Act Amendments of 1988.

"(b) 'Employee' means any officer or employee of an agency, including a special Government employee.

"(c) 'Agency' means any executive agency as defined in 5 U.S.C. 105, including any executive department as defined in 5 U.S.C. 101, Government corporation as defined in 5 U.S.C. 103, or an independent establishment in the executive branch as defined in 5 U.S.C. 104 (other than the General Accounting Office), and the United States Postal Service and Postal Rate Commission.

"(d) 'Head of an agency' means, in the case of an agency headed by more than one person, the chair or comparable member of such agency.

"(e) 'Special Government employee' means a special Government employee as defined in 18 U.S.C. 202(a).

"Sec. 504. *Judicial Review.* This order is intended only to improve the internal management of the executive branch and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.".

GEORGE BUSH

THE WHITE HOUSE,
October 17, 1990.

Synopsis of Standards of Ethical Conduct for Employees of the Executive Branch, Prepared and Distributed by the U.S. Office of Government Ethics to Accompany Final Rule Published on August 7, 1992, 57 Fed. Reg. 35006

THE STANDARDS OF ETHICAL CONDUCT

Effective February 3, 1993, the Standards of Ethical Conduct for Employees of the Executive Branch at 5 CFR Part 2635 replace the many individual agency standards of conduct regulations with a uniform set of standards applicable to all employees of the Executive branch. Where necessary, individual agencies have authority to issue supplemental regulations.

Because they are intended to answer questions about the ethical conduct of more than a million individuals employed by more than 100 different Federal agencies, the new Standards of Ethical Conduct are detailed. They contain many examples and will readily answer most ethical questions employees will have. The attached synopsis has been prepared by the Office of Government Ethics to give employees enough familiarity with the contents of the regulations to recognize ethical issues when they arise and to assist in looking up relevant provisions in the regulations. Because the synopsis provides only a shorthand reference to lengthier provisions in the regulations, an employee must refer to the regulations themselves in resolving ethical issues that actually arise or may seek the advice of an agency ethics official.

SYNOPSIS OF SUBPART A - GENERAL PROVISIONS

THE PRINCIPLES OF ETHICAL CONDUCT. The following principles of ethical conduct apply to all officers and employees of the executive branch and many form the basis for specific standards set forth in the regulation.

Public service is a public trust, requiring employees to place loyalty to the Constitution, the laws and ethical principles above private gain.

Employees shall not hold financial interests that conflict with the conscientious performance of duty.

Employees shall not engage in financial transactions using nonpublic Government information or allow the improper use of such information to further any private interest.

An employee shall not, except pursuant to the exceptions in subpart B, solicit or accept any gift or other item of monetary value from any person or entity seeking official action from, doing business with, or conducting activities regulated by the employee's agency, or whose interests may be substantially affected by the performance or nonperformance of the employee's duties.

Employees shall put forth honest effort in the performance of their duties.

Employees shall make no unauthorized commitments or promises of any kind purporting to bind the Government.

Employees shall not use public office for private gain.

Employees shall act impartially and not give preferential treatment to any private organization or individual.

Employees shall protect and conserve Federal property and shall not use it for other than authorized activities.

Employees shall not engage in outside employment or activities, including seeking or negotiating for employment, that conflict with official Government duties and responsibilities.

Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities.

Employees shall satisfy in good faith their obligations as citizens, including all just financial obligations, especially those -- such as Federal, State and local taxes -- that are imposed by law.

Employees shall adhere to all laws and regulations that provide equal opportunity for all Americans regardless of race, color, religion, sex, national origin, age, or handicap.

Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or these Standards of Ethical Conduct.

BASIC CONCEPTS.

Employees shall apply the principles stated above in weighing the propriety of conduct not otherwise addressed in the regulations;

Employees shall judge whether circumstances will violate the appearance principle, the last principle set forth above, from the perspective of a reasonable person with knowledge of the relevant facts.

There are special rules for determining which standards apply to employees detailed to other agencies, to other branches of the Federal government, to State or local governments or to international organizations.

A violation of the regulatory standards may be cause for corrective action or for disciplinary action against an employee. There are criminal penalties for violations of criminal statutes referred to in the regulations.

Employees are encouraged to seek the advice of agency ethics officials. Disciplinary action for violation of regulatory standards will not be taken against an employee who relies on such advice.

DEFINITIONS. Terms used throughout the Standards of Ethical Conduct, such as "agency designee" and "special Government employee," are defined in subpart A. Terms of more limited applicability are defined in the subparts or sections to which they apply.

SYNOPSIS OF SUBPART B - GIFTS FROM OUTSIDE SOURCES

BASIC PROHIBITION ON GIFTS FROM OUTSIDE SOURCES. An employee shall not solicit or accept a gift given because of his official position or from a prohibited source. A prohibited source is defined as any person, including any organization more than half of whose members are persons:

Seeking official action by his agency;

Doing or seeking to do business with his agency;

Regulated by his agency; or

Substantially affected by the performance of his duties.

DEFINITION OF A GIFT. The term "gift" includes almost anything of monetary value. However, it does not include:

Coffee, donuts and similar modest items of food and refreshments when offered other than as part of a meal;

Greeting cards and most plaques, certificates and trophies;

Prizes in contests open to the public;

Commercial discounts available to the general public or to all Government or military personnel;

Commercial loans, and pensions and similar benefits.

Anything paid for by the Government, secured by the Government under Government contract or accepted by the Government in accordance with a statute;

Anything for which the employee pays market value;

EXCEPTIONS. Subject to the limitations noted below, there are exceptions which will permit an employee to accept:

Unsolicited gifts with a market value of $20 or less per occasion, aggregating no more than $50 in a calendar year from any one source (this exception does not permit gifts of cash or investment interests);

Gifts when clearly motivated by a family relationship or personal friendship;

Commercial discounts and similar benefits offered to groups in which membership is not related to Government employment or, if membership is related to Government employment, where the same offer is broadly available to the public through similar groups, and certain benefits offered by professional associations or by persons who are not prohibited sources.

Certain awards and honorary degrees;

Gifts resulting from the outside business activities of employees and their spouses;

Travel and entertainment in connection with employment discussions;

Certain gifts from political organizations;

Free attendance provided by the sponsor of an event for the day on which an employee is speaking or presenting information at the event;

Free attendance provided by the sponsor of a widely-attended gathering of mutual interest to a number of parties where the necessary determination of agency interest has been made;

Invitations to certain social events extended by persons who are not prohibited sources, provided no one is charged a fee to attend the event;

Certain gifts of food and entertainment in foreign areas;

Gifts accepted by the employee under a specific statute, such as 5 U.S.C. 4111 and 7342, or pursuant to a supplemental agency regulation.

LIMITATIONS ON USE OF EXCEPTIONS. An employee may not use any of the exceptions noted above to solicit or coerce the offering of a gift or to accept gifts:

For being influenced in the performance of official duties;

In violation of any statute;

So frequently as to appear to be using public office for private gain; or

In violation of applicable procurement policies regarding participation in vendor promotional training.

DISPOSITION OF GIFTS. When an employee cannot accept a gift, the employee should pay the donor its market value. If the gift is a tangible item, the employee may instead return the gift. Subject to approval, however, perishable items may be donated to a charity, destroyed or shared within the office.

SYNOPSIS OF SUBPART C - GIFTS BETWEEN EMPLOYEES

BASIC PROHIBITION ON GIFTS BETWEEN EMPLOYEES. An employee shall not:

> Give or solicit for a gift to an official superior; or
>
> Accept a gift from a lower-paid employee, unless the donor and recipient are personal friends who are not in a superior-subordinate relationship.

DEFINITION OF A GIFT. The term "gift" has the same meaning as in subpart B. However, carpooling and similar arrangements are excluded where there is a proportionate sharing of the cost and effort involved.

DEFINITION OF AN OFFICIAL SUPERIOR. The term "official superior" includes anyone whose official responsibilities involve directing or evaluating the performance of the employee's official duties or those of any other official superior of the employee. The term is not limited to immediate supervisors but applies to officials up the supervisory chain.

EXCEPTIONS. Subject to a limitation on using any exception to coerce a gift from a subordinate, there are exceptions that:

> On an occasional basis, including birthdays and other occasions when gifts are traditionally exchanged, permit giving and accepting:
>
>> Items other than cash aggregating $10 or less per occasion;
>>
>> Food and refreshments shared in the office;
>>
>> Personal hospitality at a residence;
>>
>> Appropriate hostess gifts; and
>>
>> Leave sharing under OPM regulations;
>
> On infrequent occasions of personal significance, such as marriage, and on occasions that terminate the superior-subordinate relationship, such as retirement, permit giving and accepting gifts appropriate to the occasion; and
>
> Permit voluntary contributions of nominal amounts to be made or solicited for gifts of food and refreshments to be shared in the office or for group gifts on occasions such as marriage or retirement described in the preceding paragraph.

SYNOPSIS OF SUBPART D - CONFLICTING FINANCIAL INTERESTS

DISQUALIFYING FINANCIAL INTERESTS. Under the criminal conflict of interest statute, 18 U.S.C. 208, an employee is prohibited from participating in an official capacity in any particular matter in which, to his knowledge, he or certain other persons have a financial interest, if the particular matter will have a direct and predictable effect on his own or that person's financial interests.

APPLICABILITY. In addition to matters that affect his own financial interests, this prohibition applies to particular matters that affect the financial interests of:

The employee's spouse, minor child or general partner; or

Any person the employee serves as officer, director, trustee, general partner or employee;

The prohibition also applies to particular matters that affect the financial interests of a person with whom the employee is negotiating for or has an arrangement concerning future employment. However, this aspect of the statute is addressed more specifically in subpart F.

DISQUALIFICATION. Disqualification can be accomplished simply by not participating in the matter. Although an employee should notify the person responsible for his assignment of the need to disqualify, a written disqualification statement is necessary only if required by an ethics agreement or requested by an agency ethics official or the person responsible for the employee's assignment.

SOLUTIONS OTHER THAN DISQUALIFICATION. Disqualification is not required if the financial interest is the subject of one of the statutory waivers described in subpart D or if the employee has sold or otherwise divested the conflicting interest.

PROHIBITED FINANCIAL INTERESTS. In general, employees may acquire and hold financial interests subject only to the disqualification requirement imposed by 18 U.S.C. 208. However, some agencies have statutes that prohibit employees from acquiring or holding particular interests. In addition, subpart D gives agencies the authority, by supplemental regulation, to prohibit employees from acquiring or holding certain financial interests. Agencies also may prohibit an individual employee from holding financial interests where disqualification would impair the employee's ability to perform the duties of his position or adversely affect the agency's mission. An employee directed to divest a financial interest may be eligible for special tax treatment of the transaction.

SYNOPSIS OF SUBPART E - IMPARTIALITY IN PERFORMING OFFICIAL DUTIES

CONSIDERATION OF CERTAIN PERSONAL AND BUSINESS RELATIONSHIPS. Even though his disqualification may not be required under subpart D, an employee should not participate in an official capacity in certain matters without first obtaining specific authorization if, in his judgment, persons with knowledge of the relevant facts would question his impartiality in those matters.

> MATTERS COVERED. The matters covered include a particular matter involving specific parties if the employee knows that it is likely to affect the financial interests of a member of his household or that one the following persons is a party or represents a party in the matter:
>
> > A person with whom the employee has or seeks a business or other financial relationship;
> >
> > A member of the employee's household or relative with whom the employee has a close personal relationship;
> >
> > A person the employee's spouse, parent or child serves or seeks to serve as officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee;
> >
> > A person the employee has, in the past year, served as officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee; or
> >
> > An organization, other than a political party, in which the employee is an active participant.
>
> DISQUALIFICATION. Disqualification can be accomplished in the same manner as when required under subpart D for disqualifying financial interests.
>
> AUTHORIZATION TO PARTICIPATE. Notwithstanding the employee's determination that his impartiality would be questioned, the agency designee can authorize the employee to participate in the matter based on a determination that the Government's interest in the employee's participation outweighs the concern that a reasonable person would question the integrity of agency programs and operations. The authorization permitted by subpart E cannot be given, however, if the employee's disqualification is also required by subpart D.
>
> OTHER APPLICATION OF THE PROCESS. Employees are urged to use the process set forth in subpart E to decide whether they should or should not participate in other matters in which their impartiality is likely to be questioned.

8

EXTRAORDINARY PAYMENTS FROM FORMER EMPLOYERS. An employee is disqualified for 2 years from participating in any particular matter in which his former employer is a party or represents a party if, prior to entering Federal service, that employer gave him an extraordinary payment in excess of $10,000.

> A routine severance and other payment made under an established employee benefits plan would not be an extraordinary payment.
>
> There is authority to waive all or part of this disqualification requirement.

SYNOPSIS OF SUBPART F - SEEKING OTHER EMPLOYMENT

DISQUALIFICATION WHILE SEEKING EMPLOYMENT. An employee is prohibited from participating in an official capacity in any particular matter that, to his knowledge, has a direct and predictable effect on the financial interests of a person with whom he is seeking employment. For this purpose, "employment" means any form of non-Federal employment or business relationship involving the provision of personal services.

DEFINITION OF SEEKING EMPLOYMENT. The term "seeking employment" includes bilateral negotiations with another, mutually conducted with a view to reaching an agreement regarding possible employment. It also includes conduct short of negotiations, such as sending an unsolicited resume or other employment proposal. It can include employment contacts by or through an agent or intermediary. However, it does not include simply:

Rejecting an unsolicited employment overture;

Requesting a job application; or

Sending an unsolicited resume or other employment proposal to a person affected by performance of the employees duties only as a member of an industry or other discrete class.

Having once begun, an employee generally continues to be seeking employment until he or the prospective employer rejects the possibility of employment and all discussions end. However, an employee is no longer seeking employment with the recipient of his unsolicited resume or other employment proposal after two months have passed with no indication of interest in employment discussions from the prospective employer.

DISQUALIFICATION. Disqualification can be accomplished in the same manner as when required under subpart D for disqualifying financial interests.

SOLUTIONS OTHER THAN DISQUALIFICATION. If the employee's conduct in seeking employment amounts to negotiations, the employee can participate in the matter affecting his prospective employer only if granted an individual waiver described in subpart D. If his conduct falls short of negotiations, the employee may be authorized to participate using the procedures set forth in subpart E.

DISQUALIFICATION BASED ON AN EMPLOYMENT ARRANGEMENT. An employee may not participate in a particular matter that, to his knowledge, has a direct and predictable effect on the financial interests of anyone with whom he has an arrangement concerning future employment. In this case, an employee may be able to participate in a particular matter affecting a prospective employer only if he has received an individual waiver described in subpart D.

SYNOPSIS OF SUBPART G - MISUSE OF POSITION

USE OF PUBLIC OFFICE FOR PRIVATE GAIN. An employee shall not use his public office for his own private gain or for the private gain of friends, relatives or persons with whom he is affiliated in a non-governmental capacity, or for the endorsement of any product, service or enterprise. In particular, an employee shall not use his Government position, title or authority:

> In a manner intended to induce another to provide any benefit to himself or to friends, relatives or affiliated persons;
>
> In a manner that could be construed to imply that his agency or the Government sanctions or endorses his personal activities or those of another; or
>
> To endorse any product, service or enterprise except in furtherance of statutory authority to do so, in accordance with agency programs to give recognition for achievement or to document compliance with agency standards or requirements.

USE OF NONPUBLIC INFORMATION. An employee shall not engage in a financial transaction using nonpublic information, or allow the improper use of nonpublic information to further his own private interests or those of another. Information that is "nonpublic" includes information the employee knows or reasonably should know:

> Is routinely exempt from disclosure under the Freedom of Information Act or protected from disclosure by statute;
>
> Is designated as confidential by an agency; or
>
> Has not actually been disseminated to the general public and is not authorized to be made available to the public on request.

USE OF GOVERNMENT PROPERTY. An employee has a duty to protect and conserve Government property and to use Government property only for authorized purposes. Authorized purposes are those for which Government property is made available to the public or those purposes authorized in accordance with law or regulation.

USE OF OFFICIAL TIME. Unless authorized in accordance with law or regulation to use such time for other purposes, an employee shall use official time in an honest effort to perform official duties. And, an employee shall not encourage, direct, coerce or request a subordinate to use official time to perform activities other than those required in the performance of official duties or those authorized in accordance with law or regulation.

SYNOPSIS OF SUBPART H - OUTSIDE ACTIVITIES

GENERALLY. In addition to the standards set forth in subpart H, an employee's outside employment and other activities must comply with all ethical requirements set forth in the subparts A through G of the regulation, including the requirement to avoid even the appearance of using public office for private gain. For example, the prohibition against use of Government property for unauthorized purposes would prohibit an employee from using the agency photocopier to reproduce documents for his outside organization.

RESTRICTIONS IMPOSED BY OTHER LAWS. An employee's outside employment and other activities must comply with applicable laws other than the Standards of Ethical Conduct. Several are listed in subparts H and I. Outside activities frequently raise questions about the following:

> The restrictions in 18 U.S.C. 203 and 205 on employees engaging in representational activities before the United States;
>
> The constitutional prohibition against accepting any office, title or compensation from a foreign government; and
>
> The Hatch Act, which prohibits most employees' participation in certain partisan political activities.

PRIOR APPROVAL FOR OUTSIDE ACTIVITIES. When required by supplemental agency regulation, an employee shall obtain approval before engaging in outside employment or activities.

CONFLICTING OUTSIDE ACTIVITIES. An employee shall not engage in outside employment or activities prohibited by statute or by supplemental agency regulation, or that would materially impair the ability to perform his official duties by requiring his disqualification under subpart D or E.

RESTRICTIONS ON RECEIPT OF COMPENSATION. With certain exceptions, Presidential appointees to full-time noncareer positions shall not receive any outside earned income for outside employment or other outside activities performed during that appointment. Higher-level noncareer employees may not, in any calendar year, receive outside earned income which exceeds 15 percent of the rate of pay for Level II of the Executive Schedule. These noncareer employees also are prohibited from receiving any compensation for teaching without prior approval, serving as officers or board members of outside entities, practicing certain professions or being affiliated with firms or other entities that practice those professions.

SERVICE AS AN EXPERT WITNESS. In the absence of specific authorization, an employee shall not represent anyone other than the United States as an expert witness in any proceeding before a court or agency of the United States if the United States is a party or has a direct and substantial interest. The restriction applies even though no compensation is received. A less restrictive standard applies to special Government employees.

TEACHING, SPEAKING AND WRITING. An employee shall not receive compensation for teaching, speaking or writing that is related to his official duties.

> DEFINITION OF RELATED TO DUTIES. Teaching, speaking or writing is "related to an employee's official duties" if:
>
>> The activity is undertaken as part of his official duties;
>>
>> The invitation to engage in the activity was extended primarily because of his official position;

The invitation or the offer of compensation was extended by a person whose interests may be affected by the employee's official duties;

The information draws substantially on nonpublic information; or

For most employees, the subject of the teaching, speaking or writing deals in significant part with any matter presently assigned to the employee, any matter to which the employee had been assigned in the previous one-year period, or to any ongoing or announced policy, program or operation of his agency. Certain noncareer employees are subject to additional restrictions and special Government employees are subject to less restrictive standards.

EXCEPTION FOR TEACHING. An employee may receive compensation for teaching certain courses, notwithstanding that the subject matter is related to his official duties and notwithstanding that he may have been offered the opportunity because of his official position.

FUNDRAISING. Provided that he does not otherwise violate the Standards of Ethical Conduct, an employee may engage in charitable fundraising activities in a personal capacity if he does not use his official title, position or authority to further that effort or personally solicit funds or other support from subordinates or from anyone known to him to be a prohibited source for purposes of the gift restrictions in subpart B. A special Government employee, however, may solicit charitable contributions from a prohibited source as long as that person does not have interests affected by the performance of his official duties.

JUST FINANCIAL OBLIGATIONS. Employees shall satisfy in good faith all just financial obligations.

U.S. Office of Government Ethics

Final Rule, Standards of Ethical Conduct for Employees of the Executive Branch, 57 Fed. Reg. 35006 (August 7, 1992)

PART 2635—STANDARDS OF ETHICAL CONDUCT FOR EMPLOYEES OF THE EXECUTIVE BRANCH

Subpart A—General Provisions

Sec.

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Subpart A—General Provisions

§ 2635.101 Basic obligation of public service.

(a) *Public service is a public trust.* Each employee has a responsibility to the United States Government and its citizens to place loyalty to the Constitution, laws and ethical principles above private gain. To ensure that every citizen can have complete confidence in the integrity of the Federal Government, each employee shall respect and adhere to the principles of ethical conduct set forth in this section, as well as the implementing standards contained in this part and in supplemental agency regulations.

(b) *General principles.* The following general principles apply to every employee and may form the basis for the standards contained in this part. Where a situation is not covered by the standards set forth in this part, employees shall apply the principles set forth in this section in determining whether their conduct is proper.

(1) Public service is a public trust, requiring employees to place loyalty to the Constitution, the laws and ethical principles above private gain.

(2) Employees shall not hold financial interests that conflict with the conscientious performance of duty.

(3) Employees shall not engage in financial transactions using nonpublic Government information or allow the improper use of such information to further any private interest.

(4) An employee shall not, except as permitted by subpart B of this part, solicit or accept any gift or other item of monetary value from any person or entity seeking official action from, doing business with, or conducting activities regulated by the employee's agency, or whose interests may be substantially affected by the performance or nonperformance of the employee's duties.

(5) Employees shall put forth honest effort in the performance of their duties.

(6) Employees shall not knowingly make unauthorized commitments or promises of any kind purporting to bind the Government.

(7) Employees shall not use public office for private gain.

(8) Employees shall act impartially and not give preferential treatment to any private organization or individual.

(9) Employees shall protect and conserve Federal property and shall not use it for other than authorized activities.

(10) Employees shall not engage in outside employment or activities, including seeking or negotiating for employment, that conflict with official Government duties and responsibilities.

(11) Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities.

(12) Employees shall satisfy in good faith their obligations as citizens, including all just financial obligations, especially those—such as Federal, State, or local taxes—that are imposed by law.

(13) Employees shall adhere to all laws and regulations that provide equal opportunity for all Americans regardless of race, color, religion, sex, national origin, age, or handicap.

(14) Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in this part. Whether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts.

(c) *Related statutes.* In addition to the standards of ethical conduct set forth in this part, there are conflict of interest statutes that prohibit certain conduct. Criminal conflict of interest statutes of general applicability to all employees, 18 U.S.C. 201, 203, 205, 208, and 209, are summarized in the appropriate subparts of this part and must be taken into consideration in determining whether conduct is proper. Citations to other generally applicable statutes relating to employee conduct are set forth in subpart I and employees are further cautioned that there may be additional statutory and regulatory restrictions applicable to them generally or as employees of their specific agencies. Because an employee is considered to be on notice of the requirements of any statute, an employee should not rely upon any description or synopsis of a statutory restriction, but should refer to the statute itself and obtain the advice of an agency ethics official as needed.

§ 2635.102 Definitions.

The definitions listed below are used throughout this part. Additional definitions appear in the subparts or sections of subparts to which they apply. For purposes of this part:

(a) *Agency* means an executive agency as defined in 5 U.S.C. 105 and the Postal Service and the Postal Rate Commission. It does not include the General Accounting Office or the Government of the District of Columbia.

(b) *Agency designee* refers to any employee who, by agency regulation, instruction, or other issuance, has been delegated authority to make any determination, give any approval, or take any other action required or permitted by this part with respect to another employee. An agency may delegate these authorities to any number of agency designees necessary to ensure that determinations are made, approvals are given, and other actions are taken in a timely and responsible manner. Any provision that requires a determination, approval, or other action by the agency designee shall, where the conduct in issue is that of the agency head, be deemed to require that such determination, approval or action be made or taken by the agency head in consultation with the designated agency ethics official.

(c) *Agency ethics official* refers to the designated agency ethics official or to the alternate designated agency ethics official, referred to in § 2638.202(b) of this chapter, and to any deputy ethics official, described in § 2638.204 of this chapter, who has been delegated authority to assist in carrying out the responsibilities of the designated agency ethics official.

(d) *Agency programs or operations* refers to any program or function carried out or performed by an agency, whether pursuant to statute, Executive order, or regulation.

(e) *Corrective action* includes any action necessary to remedy a past violation or prevent a continuing violation of this part, including but not limited to restitution, change of assignment, disqualification, divestiture, termination of an activity, waiver, the creation of a qualified diversified or blind trust, or counseling.

(f) *Designated agency ethics official* refers to the official designated under § 2638.201 of this chapter.

(g) *Disciplinary action* includes those disciplinary actions referred to in Office of Personnel Management regulations and instructions implementing provisions of title 5 of the United States Code or provided for in comparable provisions applicable to employees not subject to title 5, including but not limited to reprimand, suspension, demotion, and removal. In the case of a military officer, comparable provisions may include those in the Uniform Code of Military Justice.

(h) *Employee* means any officer or employee of an agency, including a special Government employee. It includes officers but not enlisted members of the uniformed services. For purposes other than subparts B and C of this part, it does not include the President or Vice President. Status as an employee is unaffected by pay or leave status or, in the case of a special Government employee, by the fact that the individual does not perform official duties on a given day.

(i) *Head of an agency* means, in the case of an agency headed by more than one person, the chair or comparable member of such agency.

(j) *He, his,* and *him* include she, hers and her.

(k) *Person* means an individual, corporation and subsidiaries it controls, company, association, firm, partnership, society, joint stock company, or any other organization or institution, including any officer, employee, or agent of such person or entity. For purposes of this part, a corporation will be deemed to control a subsidiary if it owns 50 percent or more of the subsidiary's voting securities. The term is all-inclusive and applies to commercial ventures and nonprofit organizations as well as to foreign, State, and local governments, including the Government of the District of Columbia. It does not include any agency or other entity of the Federal Government or any officer or employee thereof when acting in his official capacity on behalf of that agency or entity.

(l) *Special Government employee* means those executive branch officers or employees specified in 18 U.S.C. 202(a). A special Government employee is retained, designated, appointed, or employed to perform temporary duties either on a full-time or intermittent basis, with or without compensation, for a period not to exceed 130 days during any consecutive 365-day period.

(m) *Supplemental agency regulation* means a regulation issued pursuant to § 2635.105.

§ 2635.103 Applicability to members of the uniformed services.

The provisions of this part, except this section, are not applicable to enlisted members of the uniformed services. Each agency with jurisdiction over enlisted members of the uniformed services shall issue regulations defining the ethical conduct obligations of enlisted members under its jurisdiction. Those regulations shall be consistent with Executive Order 12674, April 12, 1989, as modified, and may prescribe the full range of statutory and regulatory sanctions, including those available under the Uniform Code of Military Justice, for failure to comply with such regulations.

§ 2635.104 Applicability to employees on detail.

(a) *Details to other agencies.* Except as provided in paragraph (d) of this section, an employee on detail, including a uniformed officer on assignment, from his employing agency to another agency for a period in excess of 30 calendar days shall be subject to any supplemental agency regulations of the agency to which he is detailed rather than to any supplemental agency regulations of his employing agency.

(b) *Details to the legislative or judicial branch.* An employee on detail, including a uniformed officer on assignment, from his employing agency to the legislative or judicial branch for a period in excess of 30 calendar days shall be subject to the ethical standards of the branch or entity to which detailed. For the duration of any such detail or assignment, the employee shall not be subject to the provisions of this part, except this section, or, except as provided in paragraph (d) of this section to any supplemental agency regulations of his employing agency, but shall remain subject to the conflict of interest prohibitions in title 18 of the United States Code.

(c) *Details to non-Federal entities.* Except to the extent exempted in writing pursuant to this paragraph, an employee detailed to a non-Federal entity remains subject to this part and to any supplemental agency regulation of his employing agency. When an employee is detailed pursuant to statutory authority to an international organization or to a State or local government for a period in excess of six months, the designated agency ethics official may grant a written exemption from subpart B of this part based on his determination that the entity has adopted written ethical standards covering solicitation and acceptance of gifts which will apply to the employee during the detail and which will be appropriate given the purpose of the detail.

(d) *Applicability of special agency statutes.* Notwithstanding paragraphs (a) and (b) of this section, an employee who is subject to an agency statute which restricts his activities or financial holdings specifically because of his status as an employee of that agency shall continue to be subject to any provisions in the supplemental agency regulations of his employing agency that implement that statute.

§ 2635.105 Supplemental agency regulations.

In addition to the regulations set forth in this part, an employee shall comply with any supplemental agency regulations issued by his employing agency under this section.

(a) An agency that wishes to supplement this part shall prepare and submit to the Office of Government Ethics, for its concurrence and joint issuance, any agency regulations that supplement the regulations contained in this part. Supplemental agency regulations which the agency determines are necessary and appropriate, in view of its programs and operations, to fulfill the purposes of this part shall be:

(1) In the form of a supplement to the regulations in this part; and

(2) In addition to the substantive provisions of this part.

(b) After concurrence and co-signature by the Office of Government Ethics, the agency shall submit its supplemental agency regulations to the **Federal Register** for publication and codification at the expense of the agency in title 5 of the Code of Federal Regulations. Supplemental agency regulations issued under this section are effective only after concurrence and co-signature by the Office of Government Ethics and publication in the **Federal Register**.

(c) This section applies to any supplemental agency regulations or amendments thereof issued under this part. It does not apply to:

(1) A handbook or other issuance intended merely as an explanation of the standards contained in this part or in supplemental agency regulations;

(2) An instruction or other issuance the purpose of which is to:

(i) Delegate to an agency designee authority to make any determination, give any approval or take any other action required or permitted by this part or by supplemental agency regulations; or

(ii) Establish internal agency procedures for documenting or processing any determination, approval or other action required or permitted by this part or by supplemental agency regulations, or for retaining any such documentation; or

(3) Regulations or instructions that an agency has authority, independent of this part, to issue, such as regulations implementing an agency's gift acceptance statute, protecting categories of nonpublic information or establishing standards for use of Government vehicles. Where the content of any such regulations or instructions was included in the agency's standards of conduct regulations issued pursuant to Executive Order 11222 and the Office of Government Ethics concurs that they need not be issued as part of an agency's supplemental agency regulations, those regulations or instructions may be promulgated separately from the agency's supplemental agency regulations.

§ 2635.106 Disciplinary and corrective action.

(a) Except as provided in § 2635.107, a violation of this part or of supplemental agency regulations may be cause for appropriate corrective or disciplinary action to be taken under applicable Governmentwide regulations or agency procedures. Such action may be in addition to any action or penalty prescribed by law.

(b) It is the responsibility of the employing agency to initiate appropriate disciplinary or corrective action in individual cases. However, corrective action may be ordered or disciplinary action recommended by the Director of the Office of Government Ethics under the procedures at part 2638 of this chapter.

(c) A violation of this part or of supplemental agency regulations, as such, does not create any right or benefit, substantive or procedural, enforceable at law by any person against the United States, its agencies, its officers or employees, or any other person. Thus, for example, an individual who alleges that an employee has failed to adhere to laws and regulations that provide equal opportunity regardless of race, color, religion, sex, national origin, age, or handicap is required to follow applicable statutory and regulatory procedures, including those of the Equal Employment Opportunity Commission.

§ 2635.107 Ethics advice.

(a) As required by §§ 2638.201 and 2638.202(b) of this chapter, each agency has a designated agency ethics official who, on the agency's behalf, is responsible for coordinating and managing the agency's ethics program, as well as an alternate. The designated agency ethics official has authority under § 2638.204 of this chapter to delegate certain responsibilities, including that of providing ethics counseling regarding the application of this part, to one or more deputy ethics officials.

(b) Employees who have questions about the application of this part or any supplemental agency regulations to particular situations should seek advice from an agency ethics official. Disciplinary action for violating this part or any supplemental agency regulations will not be taken against an employee who has engaged in conduct in good faith reliance upon the advice of an agency ethics official, provided that the employee, in seeking such advice, has made full disclosure of all relevant circumstances. Where the employee's conduct violates a criminal statute, reliance on the advice of an agency ethics official cannot ensure that the employee will not be prosecuted under that statute. However, good faith reliance on the advice of an agency ethics official is a factor that may be taken into account by the Department of Justice in the selection of cases for prosecution. Disclosures made by an employee to an agency ethics official are not protected by an attorney-client privilege. An agency ethics official is required by 28 U.S.C. 535 to report any information he receives relating to a violation of the criminal code, title 18 of the United States Code.

Subpart B—Gifts From Outside Sources

§ 2635.201 Overview.

This subpart contains standards that prohibit an employee from soliciting or accepting any gift from a prohibited source or given because of the employee's official position unless the item is excluded from the definition of a gift or falls within one of the exceptions set forth in this subpart.

§ 2635.202 General standards.

(a) *General prohibitions.* Except as provided in this subpart, an employee shall not, directly or indirectly, solicit or accept a gift:

(1) From a prohibited source; or

(2) Given because of the employee's official position.

(b) *Relationship to illegal gratuities statute.* Unless accepted in violation of paragraph (c)(1) of this section, a gift accepted under the standards set forth in this subpart shall not constitute an illegal gratuity otherwise prohibited by 18 U.S.C. 201(c)(1)(B).

(c) *Limitations on use of exceptions.* Notwithstanding any exception provided in this subpart, other than § 2635.204(j), an employee shall not:

(1) Accept a gift in return for being influenced in the performance of an official act;

(2) Solicit or coerce the offering of a gift;

(3) Accept gifts from the same or different sources on a basis so frequent that a reasonable person would be led to believe the employee is using his public office for private gain;

Example 1: A purchasing agent for a Veterans Administration hospital routinely deals with representatives of pharmaceutical manufacturers who provide information about new company products. Because of his crowded calendar, the purchasing agent has offered to meet with manufacturer representatives during his lunch hours Tuesdays through Thursdays and the representatives routinely arrive at the employee's office bringing a sandwich and a soft drink for the employee. Even though the market value of each of the lunches is less than $6 and the aggregate value from any one manufacturer does not exceed the $50 aggregate limitation in § 2635.204(a) on de minimis gifts of $20 or less, the practice of accepting even these modest gifts on a recurring basis is improper.

(4) Accept a gift in violation of any statute. Relevant statutes applicable to all employees include:

(i) 18 U.S.C. 201(b), which prohibits a public official from seeking, accepting, or agreeing to receive or accept anything of value in return for being influenced in the performance of an official act or for being induced to take or omit to take any action in violation of his official duty. As used in 18 U.S.C. 201(b), the term "public official" is broadly construed and includes regular and special Government employees as well as all other Government officials;

(ii) 18 U.S.C. 209, which prohibits an employee, other than a special Government employee, from receiving any salary or any contribution to or supplementation of salary from any source other than the United States as compensation for services as a Government employee. The statute contains several specific exceptions to this general prohibition, including an exception for contributions made from the treasury of a State, county, or municipality; and

(iii) 41 U.S.C. 423(b)(2), which prohibits a procurement official from seeking, accepting, or agreeing to receive any money, gratuity, or other thing of value from any officer, employee, representative, agent, or consultant of a competing contractor during the conduct of a Federal agency procurement. Implementing regulations, including exceptions to the gift prohibition, are contained in the Federal Acquisition Regulation, 48 CFR 3.104.

(5) Accept vendor promotional training contrary to applicable regulations, policies or guidance relating to the procurement of supplies and services for the Government, except pursuant to § 2635.204(l).

§ 2635.203 Definitions.

For purposes of this subpart, the following definitions shall apply:

(a) *Agency* has the meaning set forth in § 2635.102(a). However, for purposes of this subpart, an executive department, as defined in 5 U.S.C. 101, may, by supplemental agency regulation, designate as a separate agency any component of that department which the department determines exercises distinct and separate functions.

(b) *Gift* includes any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value. It includes services as well as gifts of training, transportation, local travel, lodgings and meals, whether provided in-kind, by purchase of a ticket, payment in advance, or reimbursement after the expense has been incurred. It does not include:

(1) Modest items of food and refreshments, such as soft drinks, coffee and donuts, offered other than as part of a meal;

(2) Greeting cards and items with little intrinsic value, such as plaques, certificates, and trophies, which are intended solely for presentation;

(3) Loans from banks and other financial institutions on terms generally available to the public;

(4) Opportunities and benefits, including favorable rates and commercial discounts, available to the public or to a class consisting of all Government employees or all uniformed military personnel, whether or not restricted on the basis of geographic considerations;

(5) Rewards and prizes given to competitors in contests or events, including random drawings, open to the public unless the employee's entry into the contest or event is required as part of his official duties;

(6) Pension and other benefits resulting from continued participation in an employee welfare and benefits plan maintained by a former employer;

(7) Anything which is paid for by the Government or secured by the Government under Government contract;

Note: Some airlines encourage those purchasing tickets to join programs that award free flights and other benefits to frequent fliers. Any such benefit earned on the basis of Government-financed travel belongs to the agency rather than to the employee and may be accepted only insofar as provided under 41 CFR 301-1.6(b).

(8) Any gift accepted by the Government under specific statutory authority, including:

(i) Travel, subsistence, and related expenses accepted by an agency under the authority of 31 U.S.C. 1353 in connection with an employee's attendance at a meeting or similar function relating to his official duties which takes place away from his duty station. The agency's acceptance must be in accordance with the implementing regulations at 41 CFR part 304–1; and

(ii) Other gifts provided in-kind which have been accepted by an agency under its agency gift acceptance statute; or

(9) Anything for which market value is paid by the employee.

(c) *Market value* means the retail cost the employee would incur to purchase the gift. An employee who cannot ascertain the market value of a gift may estimate its market value by reference to the retail cost of similar items of like quality. The market value of a gift of a ticket entitling the holder to food, refreshments, entertainment, or any other benefit shall be the face value of the ticket.

Example 1: An employee who has been given an acrylic paperweight embedded with the corporate logo of a prohibited source may determine its market value based on her observation that a comparable acrylic paperweight, not embedded with a logo, generally sells for about $20.

Example 2: A prohibited source has offered an employee a ticket to a charitable event consisting of a cocktail reception to be followed by an evening of chamber music. Even though the food, refreshments, and entertainment provided at the event may be worth only $20, the market value of the ticket is its $250 face value.

(d) *Prohibited source* means any person who:

(1) Is seeking official action by the employee's agency;

(2) Does business or seeks to do business with the employee's agency;

(3) Conducts activities regulated by the employee's agency;

(4) Has interests that may be substantially affected by performance or nonperformance of the employee's official duties; or

(5) Is an organization a majority of whose members are described in paragraphs (d) (1) through (4) of this section.

(e) A gift is solicited or accepted because of the employee's official position if it is from a person other than an employee and would not have been solicited, offered, or given had the employee not held his position as a Federal employee.

Note: Gifts between employees are subject to the limitations set forth in subpart C of this part.

Example 1: Where free season tickets are offered by an opera guild to all members of the Cabinet, the gift is offered because of their official positions.

(f) A gift which is solicited or accepted indirectly includes a gift:

(1) Given with the employee's knowledge and acquiescence to his parent, sibling, spouse, child, or dependent relative because of that person's relationship to the employee, or

(2) Given to any other person, including any charitable organization, on the basis of designation, recommendation, or other specification by the employee, except as permitted for the disposition of perishable items by § 2635.205(a)(2) or for payments made to charitable organizations in lieu of honoraria under § 2636.204 of this chapter.

Example 1: An employee who must decline a gift of a personal computer pursuant to this subpart may not suggest that the gift be given instead to one of five charitable organizations whose names are provided by the employee.

(g) *Vendor promotional training* means training provided by any person for the purpose of promoting its products or services. It does not include training provided under a Government contract or by a contractor to facilitate use of products or services it furnishes under a Government contract.

§ 2635.204 Exceptions.

The prohibitions set forth in § 2635.202(a) do not apply to a gift accepted under the circumstances described in paragraphs (a) through (l) of this section and a gift accepted in accordance with one of those paragraphs will not be deemed to violate the principles set forth in § 2635.101(b). Even though acceptance of a gift may be permitted by one of the exceptions contained in paragraphs (a) through (l) of this section, it is never inappropriate and frequently prudent for an employee to decline a gift offered by a prohibited source or because of his official position.

(a) *Gifts of $20 or less.* An employee may accept unsolicited gifts having an aggregate market value of $20 or less per occasion, provided that the aggregate market value of individual gifts received from any one person under the authority of this paragraph shall not exceed $50 in a calendar year. This exception does not apply to gifts of cash or of investment interests such as stock, bonds, or certificates of deposit. Where the market value of a gift or the aggregate market value of gifts offered on any single occasion exceeds $20, the employee may not pay the excess value over $20 in order to accept that portion of the gift or those gifts worth $20. Where the aggregate value of tangible items offered on a single occasion exceeds $20, the employee may decline any distinct and separate item in order to accept those items aggregating $20 or less.

Example 1: An employee of the Securities and Exchange Commission and his spouse have been invited by a representative of a regulated entity to a Broadway play, tickets to which have a face value of $30 each. The aggregate market value of the gifts offered on this single occasion is $60, $40 more than the $20 amount that may be accepted for a single event or presentation. The employee may not accept the gift of the evening of entertainment. He and his spouse may attend the play only if he pays the full $60 value of the two tickets.

Example 2: An employee of the Defense Mapping Agency has been invited by an association of cartographers to speak about his agency's role in the evolution of missile technology. At the conclusion of his speech, the association presents the employee a framed map with a market value of $18 and a book about the history of cartography with a market value of $15. The employee may accept the map or the book, but not both, since the aggregate value of these two tangible items exceeds $20.

Example 3: On four occasions during the calendar year, an employee of the Defense Logistics Agency was given gifts worth $10 each by four employees of a corporation that is a DLA contractor. For purposes of applying the yearly $50 limitation on gifts of $20 or less from any one person, the four gifts must be aggregated because a *person* is defined at § 2635.102(k) to mean not only the corporate entity, but its officers and employees as well. However, for purposes of applying the $50 aggregate limitation, the employee would not have to include the value of a birthday present received from his cousin, who is employed by the same corporation, if he can accept the birthday present under the exception at § 2635.204(b) for gifts based on a personal relationship.

Example 4: Under the authority of 31 U.S.C. 1353 for agencies to accept payments from non-Federal sources in connection with attendance at certain meetings or similar functions, the Environmental Protection Agency has accepted an association's gift of travel expenses and conference fees for an employee of its Office of Radiation Programs to attend an international conference on "The Chernobyl Experience." While at the conference, the employee may accept a gift of $20 or less from the association or from another person attending the conference even though it was not approved in advance by the EPA. Although 31 U.S.C. 1353 is the only authority under which an agency may accept gifts from certain non-Federal sources in connection with its employees' attendance at such functions, a gift of $20 or less accepted under § 2635.204(a) is a gift to the employee rather than to his employing agency.

Example 5: A Navy contracting officer is participating in a procurement for environmental cleanup services at a Navy installation that has recently been closed. She is presently involved in negotiations with three competing contractors, one of whom has offered her a fancy ballpoint pen embossed with its corporate logo. Even though the pen has a market value of $18 and could be accepted under the $20 de minimis exception at § 2635.204(a), the contracting officer cannot accept the competing contractor's gift. Under the procurement integrity provisions at 41 U.S.C. 423, she is a "procurement official" for that contract and, except as specifically permitted by the regulations implementing that statute, she is prohibited prior to award from accepting a gift from a competing contractor for that contract. The Federal Acquisition Regulation at 48 CFR 3.104 contains an exception for gifts with a market value of $10 or less.

(b) *Gifts based on a personal relationship.* An employee may accept a gift given under circumstances which make it clear that the gift is motivated by a family relationship or personal friendship rather than the position of the employee. Relevant factors in making such a determination include the history of the relationship and whether the family member or friend personally pays for the gift.

Example 1: An employee of the Federal Deposit Insurance Corporation has been dating a secretary employed by a member bank. For Secretary's Week, the bank has given each secretary 2 tickets to an off-Broadway musical review and has urged each to invite a family member or friend to share the evening of entertainment. Under the circumstances, the FDIC employee may accept his girlfriend's invitation to the theater. Even though the tickets were initially purchased by the member bank, they were given without reservation to the secretary to use as she wished, and her invitation to the employee was motivated by their personal friendship.

Example 2: Three partners in a law firm that handles corporate mergers have invited an employee of the Federal Trade Commission to join them in a golf tournament at a private club at the firm's expense. The entry fee is $500 per foursome. The employee cannot accept the gift of one-quarter of the entry fee even though he and the three partners have developed an amicable relationship as a result of the firm's dealings with the FTC. As evidenced in part by the fact that the fees are to be paid by the firm, it is not a personal friendship but a business relationship that is the motivation behind the partners' gift.

(c) *Discounts and similar benefits.* In addition to those opportunities and benefits excluded from the definition of a gift by § 2635.203(b)(4), an employee may accept:

(1) Reduced membership or other fees for participation in organization activities offered to all Government employees or all uniformed military personnel by professional organizations if the only restrictions on membership relate to professional qualifications; and

(2) Opportunities and benefits, including favorable rates and commercial discounts not precluded by paragraph (c)(3) of this section:

(i) Offered to members of a group or class in which membership is unrelated to Government employment;

(ii) Offered to members of an organization, such as an employees' association or agency credit union, in which membership is related to Government employment if the same offer is broadly available to large segments of the public through organizations of similar size; or

(iii) Offered by a person who is not a prohibited source to any group or class that is not defined in a manner that specifically discriminates among Government employees on the basis of type of official responsibility or on a basis that favors those of higher rank or rate of pay; provided, however, that

(3) An employee may not accept for personal use any benefit to which the Government is entitled as the result of an expenditure of Government funds.

Example 1: An employee of the Consumer Product Safety Commission may accept a discount of $50 on a microwave oven offered by the manufacturer to all members of the CPSC employees' association. Even though the CPSC is currently conducting studies on the safety of microwave ovens, the $50 discount is a standard offer that the manufacturer has made broadly available through a number of similar organizations to large segments of the public.

Example 2: An Assistant Secretary may not accept a local country club's offer of membership to all members of Department Secretariats which includes a waiver of its $5,000 membership initiation fee. Even though the country club is not a prohibited source, the offer discriminates in favor of higher ranking officials.

Example 3: The administrative officer for a district office of the Immigration and Naturalization Service has signed an INS order to purchase 50 boxes of photocopy paper from a supplier whose literature advertises that it will give a free briefcase to anyone who purchases 50 or more boxes. Because the paper was purchased with INS funds, the administrative officer cannot keep the briefcase which, if claimed and received, is Government property.

(d) *Awards and honorary degrees.* (1) An employee may accept gifts, other than cash or an investment interest, with an aggregate market value of $200 or less if such gifts are a bona fide award or incident to a bona fide award that is given for meritorious public service or achievement by a person who does not have interests that may be substantially affected by the performance or nonperformance of the employee's official duties or by an association or other organization the majority of whose members do not have such interests. Gifts with an aggregate market value in excess of $200 and awards of cash or investment interests offered by such persons as awards or incidents of awards that are given for these purposes may be accepted upon a written determination by an agency ethics official that the award is made as part of an established program of recognition:

(i) Under which awards have been made on a regular basis or which is funded, wholly or in part, to ensure its continuation on a regular basis; and

(ii) Under which selection of award recipients is made pursuant to written standards.

(2) An employee may accept an honorary degree from an institution of higher education as defined at 20 U.S.C. 1141(a) based on a written determination by an agency ethics official that the timing of the award of the degree would not cause a reasonable person to question the employee's impartiality in a matter affecting the institution.

(3) An employee who may accept an award or honorary degree pursuant to paragraph (d)(1) or (2) of this section may also accept meals and entertainment given to him and to members of his family at the event at which the presentation takes place.

Example 1: Based on a determination by an agency ethics official that the prize meets the criteria set forth in § 2635.204(d)(1), an employee of the National Institutes of Health may accept the Nobel Prize for Medicine, including the cash award which accompanies the prize, even though the prize was conferred on the basis of laboratory work performed at NIH.

Example 2: Prestigious University wishes to give an honorary degree to the Secretary of Labor. The Secretary may accept the honorary degree only if an agency ethics official determines in writing that the timing of the award of the degree would not cause a reasonable person to question the Secretary's impartiality in a matter affecting the university.

Example 3: An ambassador selected by a nonprofit organization as recipient of its annual award for distinguished service in the interest of world peace may, together with his wife, and children, attend the awards ceremony dinner and accept a crystal bowl worth $200 presented during the ceremony. However, where the organization has also offered airline tickets for the ambassador and his family to travel to the city where the awards ceremony is to be held, the aggregate value of the tickets and the crystal bowl exceeds $200 and he may accept only upon a written determination by the agency ethics official that the award is made as part of an established program of recognition.

(e) *Gifts based on outside business or employment relationships.* An employee may accept meals, lodgings, transportation and other benefits:

(1) Resulting from the business or employment activities of an employee's spouse when it is clear that such benefits have not been offered or enhanced because of the employee's official position;

Example 1: A Department of Agriculture employee whose husband is a computer programmer employed by an Agriculture Department contractor may attend the company's annual retreat for all of its employees and their families held at a resort facility. However, under § 2635.502, the employee may be disqualified from performing official duties affecting her husband's employer.

Example 2: Where the spouses of other clerical personnel have not been invited, an employee of the Defense Contract Audit Agency whose wife is a clerical worker at a defense contractor may not attend the contractor's annual retreat in Hawaii for corporate officers and members of the board of directors, even though his wife received a special invitation for herself and her spouse.

(2) Resulting from his outside business or employment activities when it is clear that such benefits have not been offered or enhanced because of his official status; or

Example 1: The members of an Army Corps of Engineers environmental advisory committee that meets 6 times per year are special Government employees. A member who has a consulting business may accept an invitation to a $50 dinner from her corporate client, an Army construction contractor, unless, for example, the invitation was extended in order to discuss the activities of the committee.

(3) Customarily provided by a prospective employer in connection with bona fide employment discussions. If the prospective employer has interests that could be affected by performance or nonperformance of the employee's duties, acceptance is permitted only if the employee first has complied with the disqualification requirements of subpart F of this part applicable when seeking employment.

Example 1: An employee of the Federal Communications Commission with responsibility for drafting regulations affecting all cable television companies wishes to apply for a job opening with a cable television holding company. Once she has properly disqualified herself from further work on the regulations as required by subpart F of this part, she may enter into employment discussions with the company and may accept the company's offer to pay for her airfare, hotel and meals in connection with an interview trip.

(4) For purposes of paragraphs (e)(1) through (3) of this section, employment shall have the meaning set forth in § 2635.603(a).

(f) *Gifts from a political organization.* An employee who is exempt under 5 U.S.C. 7324(d) from the Hatch Act prohibitions against active participation in political management or political campaigns may accept meals, lodgings, transportation and other benefits, including free attendance at events, when provided, in connection with such active participation, by a political organization described in 26 U.S.C. 527(e). Any other employee, such as a security officer, whose official duties require him to accompany an exempt employee to a political event may accept meals, free attendance and entertainment provided at the event by such a political organization.

Example 1: The Secretary of the Department of Health and Human Services is exempt from the noted Hatch Act restrictions. He may accept an airline ticket and hotel accommodations furnished by the campaign committee of a candidate for the United States Senate in order to give a speech in support of the candidate.

(g) *Widely attended gatherings and other events*—(1) *Speaking and similar engagements.* When an employee is assigned to participate as a speaker or panel participant or otherwise to present information on behalf of the agency at a conference or other event, his acceptance of an offer of free attendance at the event on the day of his presentation is permissible when provided by the sponsor of the event. The employee's participation in the event on that day is viewed as a customary and necessary part of his performance of the assignment and does not involve a gift to him or to the agency.

(2) *Widely attended gatherings.* When there has been a determination that his attendance is in the interest of the agency because it will further agency programs or operations, an employee may accept a sponsor's unsolicited gift of free attendance at all or appropriate parts of a widely attended gathering of mutual interest to a number of parties. A gathering is widely attended if, for example, it is open to members from throughout a given industry or profession or if those in attendance represent a range of persons interested in a given matter. For employees subject to a leave system, attendance at the event shall be on the employee's own time or, if authorized by the employee's agency, on excused absence pursuant to applicable guidelines for granting such absence, or otherwise without charge to the employee's leave account.

(3) *Determination of agency interest.* The determination of agency interest required by paragraph (g)(2) of this section shall be made orally or in writing by the agency designee.

(i) If the sponsor is a person who has interests that may be substantially affected by the performance or nonperformance of an employee's official duties or an association or organization the majority of whose members have such interests, the employee's participation may be determined to be in the interest of the agency only where there is a written finding by the agency designee that the agency's interest in the employee's participation in the event outweighs concern that acceptance of the gift of free attendance may or may appear to improperly influence the employee in the performance of his official duties. Relevant factors that should be considered by the agency designee include the importance of the event to the agency, the nature and sensitivity of any pending matter affecting the interests of the sponsor of the event, the significance of the employee's role in any such matter, the purpose of the event, the identity of other expected participants and the monetary value of the gift of free attendance.

(ii) A blanket determination of agency interest may be issued to cover all or any category of invitees other than those as to whom a finding is required by paragraph (g)(3)(i) of this section. Where a finding under paragraph (g)(3)(i) of this section is required, a written determination of agency interest, including the necessary finding, may be issued to cover two or more employees whose duties similarly affect the interests of the sponsor or its members.

(4) *Free attendance.* For purposes of paragraphs (g) (1) and (2) of this section, free attendance may include waiver of all or part of a conference or other fee or the provision of food, refreshments, entertainment, instruction and materials furnished to all attendees as an integral part of the event. It does not include travel expenses, lodgings, entertainment collateral to the event, or meals taken other than in a group setting with all other attendees.

Note: There are statutory authorities implemented other than by part 2635 under which an agency or an employee may be able to accept free attendance or other items not included in the definition of free attendance, such as travel expenses.

(5) *Cost provided by sponsor of event.* The cost of the employee's attendance will not be considered to be provided by the sponsor where a person other than the sponsor designates the employee to be invited and bears the cost of the employee's attendance through a contribution or other payment intended to facilitate that employee's attendance. Payment of dues or a similar assessment to a sponsoring organization does not constitute a payment intended to facilitate a particular employee's attendance.

(6) *Accompanying spouse.* When others in attendance will generally be accompanied by spouses, the agency designee may authorize an employee to accept a sponsor's invitation to an accompanying spouse to participate in all or a portion of the event at which the employee's free attendance is permitted under paragraph (g)(1) or (2) of this section. The authorization required by this paragraph may be provided orally or in writing.

Example 1: An aerospace industry association that is a prohibited source sponsors a seminar for which it charges a fee of $100. An Air Force contractor pays $500 to the association so that the association can extend free invitations to five Air Force officials designated by the contractor. The Air Force officials may not accept the gifts of free attendance. Because the contractor specified the invitees and bore the cost of their attendance, the gift of free attendance is considered to be provided by the company and not by the sponsoring association. Had the contractor paid $500 to the association in order that it might invite any five Federal employees, an Air Force official to whom the sponsoring association extended one of the five invitations could attend if his participation were determined to be in the interest of the agency.

Example 2: An employee of the Department of the Treasury authorized to participate in a panel discussion of economic issues as part of a one-day conference may accept the sponsor's waiver of the conference fee. Under the separate authority of § 2635.204(a), he may accept a token of appreciation for his speech having a market value of $20 or less.

Example 3: An Assistant U.S. Attorney is invited to attend a luncheon meeting of a local bar association to hear a distinguished judge lecture on cross-examining expert witnesses. Although members of the bar association are assessed a $15 fee for the meeting, the Assistant U.S. Attorney may accept the bar association's offer to attend for free, even without a determination of agency interest. The gift can be accepted under the $20 de minimis exception at § 2635.204(a).

Example 4: An employee of the Department of the Interior authorized to speak on the first day of a four-day conference on endangered species may accept the sponsor's waiver of the conference fee for the first day of the conference. If the conference is widely attended, he may be authorized, based on a determination that his attendance is in the agency's interest, to accept the sponsor's offer to waive the attendance fee for the remainder of the conference.

(h) *Social invitations from persons other than prohibited sources.* An employee may accept food, refreshments and entertainment, not including travel or lodgings, at a social event attended by several persons where:

(1) The invitation is from a person who is not a prohibited source; and

(2) No fee is charged to any person in attendance.

Example 1: Along with several other Government officials and a number of individuals from the private sector, the Administrator of the Environmental Protection Agency has been invited to the premier showing of a new adventure movie about industrial espionage. The producer is paying all costs of the showing. The Administrator may accept the invitation since the producer is not a prohibited source and no attendance fee is being charged to anyone who has been invited.

Example 2: An employee of the White House Press Office has been invited to a cocktail party given by a noted Washington hostess who is not a prohibited source. The employee may attend even though he has only recently been introduced to the hostess and suspects that he may have been invited because of his official position.

(i) *Meals, refreshments and entertainment in foreign areas.* An employee assigned to duty in, or on official travel to, a foreign area as defined in 41 CFR 301-7.3(c) may accept food, refreshments or entertainment in the course of a breakfast, luncheon, dinner or other meeting or event provided:

(1) The market value in the foreign area of the food, refreshments or entertainment provided at the meeting or event, as converted to U.S. dollars, does not exceed the per diem rate for the foreign area specified in the U.S. Department of State's Maximum Per Diem Allowances for Foreign Areas, Per Diem Supplement Section 925 to the Standardized Regulations (GC,FA) available from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

(2) There is participation in the meeting or event by non-U.S. citizens or by representatives of foreign governments or other foreign entities;

(3) Attendance at the meeting or event is part of the employee's official duties to obtain information, disseminate information, promote the export of U.S. goods and services, represent the United States or otherwise further programs or operations of the agency or the U.S. mission in the foreign area; and

(4) The gift of meals, refreshments or entertainment is from a person other than a foreign government as defined in 5 U.S.C. 7342(a)(2).

Example 1: A number of local businessmen in a developing country are anxious for a U.S. company to locate a manufacturing facility in their province. An official of the Overseas Private Investment Corporation may accompany the visiting vice president of the U.S. company to a dinner meeting hosted by the businessmen at a province restaurant where the market value of the food and refreshments does not exceed the per diem rate for that country.

(j) *Gifts to the President or Vice President.* Because of considerations relating to the conduct of their offices, including those of protocol and etiquette, the President or the Vice President may accept any gift on his own behalf or on behalf of any family member, provided that such acceptance does not violate § 2635.202(c) (1) or (2), 18 U.S.C. 201(b) or 201(c)(3), or the Constitution of the United States.

(k) *Gifts authorized by supplemental agency regulation.* An employee may accept any gift the acceptance of which is specifically authorized by a supplemental agency regulation.

(l) *Gifts accepted under specific statutory authority.* The prohibitions on acceptance of gifts from outside sources contained in this subpart do not apply to any item, receipt of which is specifically authorized by statute. Gifts which may be received by an employee under the authority of specific statutes include, but are not limited to:

(1) Free attendance, course or meeting materials, transportation, lodgings, food and refreshments or reimbursements therefor incident to training or meetings when accepted by the employee under the authority of 5 U.S.C. 4111 from an organization with tax-exempt status under 26 U.S.C. 501(c)(3) or from a person to whom the prohibitions in 18 U.S.C. 209 do not apply. The employee's acceptance must be approved by the agency in accordance with § 410.701 through § 410.706 of this title; or

Note: 26 U.S.C. 501(c)(3) is authority for tax-exempt treatment of a limited class of nonprofit organizations, including those organized and operated for charitable, religious or educational purposes. Many nonprofit organizations are not exempt from taxation under this section.

(2) Gifts from a foreign government or international or multinational organization, or its representative, when accepted by the employee under the authority of the Foreign Gifts and Decorations Act, 5 U.S.C. 7342. As a condition of acceptance, an employee must comply with requirements imposed by the agency's regulations or procedures implementing that Act.

§ 2635.205 Proper disposition of prohibited gifts.

(a) An employee who has received a gift that cannot be accepted under this subpart shall, unless the gift is accepted by an agency acting under specific statutory authority:

(1) Return any tangible item to the donor or pay the donor its market value. An employee who cannot ascertain the actual market value of an item may estimate its market value by reference to the retail cost of similar items of like quality. See § 2635.203(c).

Example 1: To avoid public embarrassment to the seminar sponsor, an employee of the National Park Service did not decline a barometer worth $200 given at the conclusion of his speech on Federal lands policy. The employee must either return the barometer or promptly reimburse the sponsor $200.

(2) When it is not practical to return a tangible item because it is perishable, the item may, at the discretion of the employee's supervisor or an agency ethics official, be given to an appropriate charity, shared within the recipient's office, or destroyed.

Example 1: With approval by the recipient's supervisor, a floral arrangement sent by a disability claimant to a helpful employee of the Social Security Administration may be placed in the office's reception area.

(3) For any entertainment, favor, service, benefit or other intangible, reimburse the donor the market value. Subsequent reciprocation by the employee does not constitute reimbursement.

Example 1: A Department of Defense employee wishes to attend a charitable event to which he has been offered a $300 ticket by a prohibited source. Although his attendance is not in the interest of the agency under § 2635.204(g), he may attend if he reimburses the donor the $300 face value of the ticket.

(4) Dispose of gifts from foreign governments or international organizations in accordance with 41 CFR part 101–49, and dispose of materials received in conjunction with official travel in accordance with 41 CFR 101–25.103.

(b) An agency may authorize disposition or return of gifts at Government expense. Employees may use penalty mail to forward reimbursements required or permitted by this section.

(c) An employee who, on his own initiative, promptly complies with the requirements of this section will not be deemed to have improperly accepted an unsolicited gift. An employee who promptly consults his agency ethics official to determine whether acceptance of an unsolicited gift is proper and who, upon the advice of the ethics official, returns the gift or otherwise disposes of the gift in accordance with this section, will be considered to have complied with the requirements of this section on his own initiative.

Subpart C—Gifts Between Employees

§ 2635.301 Overview.

This subpart contains standards that prohibit an employee from giving, donating to, or soliciting contributions for, a gift to an official superior and from accepting a gift from an employee receiving less pay than himself, unless the item is excluded from the definition of a gift or falls within one of the exceptions set forth in this subpart.

§ 2635.302 General standards.

(a) *Gifts to superiors.* Except as provided in this subpart, an employee may not:

(1) Directly or indirectly, give a gift to or make a donation toward a gift for an official superior; or

(2) Solicit a contribution from another employee for a gift to either his own or the other employee's official superior.

(b) *Gifts from employees receiving less pay.* Except as provided in this subpart, an employee may not, directly or indirectly, accept a gift from an employee receiving less pay than himself unless:

(1) The two employees are not in a subordinate-official superior relationship; and

(2) There is a personal relationship between the two employees that would justify the gift.

(c) *Limitation on use of exceptions.* Notwithstanding any exception provided in this subpart, an official superior shall not coerce the offering of a gift from a subordinate.

§ 2635.303 Definitions.

For purposes of this subpart, the following definitions shall apply:

(a) *Gift* has the meaning set forth in § 2635.203(b). For purposes of that definition an employee will be deemed to have paid market value for any benefit received as a result of his participation in any carpool or other such mutual arrangement involving another employee or other employees if he bears his fair proportion of the expense or effort involved.

(b) *Indirectly*, for purposes of § 2635.302(b), has the meaning set forth in § 2635.203(f). For purposes of § 2635.302(a), it includes a gift:

(1) Given with the employee's knowledge and acquiescence by his parent, sibling, spouse, child, or dependent relative; or

(2) Given by a person other than the employee under circumstances where the employee has promised or agreed to reimburse that person or to give that person something of value in exchange for giving the gift.

(c) Subject to paragraph (a) of this section, *market value* has the meaning set forth in § 2635.203(c).

(d) *Official superior* means any other employee, other than the President and the Vice President, including but not limited to an immediate supervisor, whose official responsibilities include directing or evaluating the performance of the employee's official duties or those of any other official superior of the employee. For purposes of this subpart, an employee is considered to be the subordinate of any of his official superiors.

(e) *Solicit* means to request contributions by personal communication or by general announcement.

(f) *Voluntary contribution* means a contribution given freely, without pressure or coercion. A contribution is not voluntary unless it is made in an amount determined by the contributing employee, except that where an amount for a gift is included in the cost for a luncheon, reception or similar event, an employee who freely chooses to pay a proportionate share of the total cost in order to attend will be deemed to have made a voluntary contribution. Except in the case of contributions for a gift included in the cost of a luncheon, reception or similar event, a statement that an employee may choose to contribute less or not at all shall accompany any recommendation of an amount to be contributed for a gift to an official superior.

Example 1: A supervisory employee of the Agency for International Development has just been reassigned from Washington, DC to Kabul, Afghanistan. As a farewell party, 12 of her subordinates have decided to take her out to lunch at the Khyber Repast. It is understood that each will pay for his own meal and that the cost of the supervisor's lunch will be divided equally among the twelve. Even though the amount they will contribute is not determined until the supervisor orders lunch, the contribution made by those who choose to participate in the farewell lunch is voluntary.

§ 2635.304 Exceptions.

The prohibitions set forth in § 2635.302(a) and (b) do not apply to a gift given or accepted under the circumstances described in paragraph (a) or (b) of this section. A contribution or the solicitation of a contribution that would otherwise violate the prohibitions set forth in § 2635.302(a) and (b) may only be made in accordance with paragraph (c) of this section.

(a) *General exceptions.* On an occasional basis, including any occasion on which gifts are traditionally given or exchanged, the following may be given to an official superior or accepted from a subordinate or other employee receiving less pay:

(1) Items, other than cash, with an aggregate market value of $10 or less per occasion;

(2) Items such as food and refreshments to be shared in the office among several employees;

(3) Personal hospitality provided at a residence which is of a type and value customarily provided by the employee to personal friends;

(4) Items given in connection with the receipt of personal hospitality if of a type and value customarily given on such occasions; and

(5) Leave transferred under subpart I of part 630 of this title to an employee who is not an immediate supervisor, unless obtained in violation of § 630.912 of this title.

Example 1: Upon returning to work following a vacation at the beach, a claims examiner with the Department of Veterans Affairs may give his supervisor, and his supervisor may accept, a bag of saltwater taffy purchased on the boardwalk for $8.

Example 2: An employee of the Federal Deposit Insurance Corporation whose bank examination responsibilities require frequent travel may not bring her supervisor, and her supervisor may not accept, souvenir coffee mugs from each of the cities she visits in the course of performing her duties, even though each of the mugs costs less than $5. Gifts given on this basis are not occasional.

Example 3: The Secretary of Labor has invited the agency's General Counsel to a dinner party at his home. The General Counsel may bring a $15 bottle of wine to the dinner party and the Secretary may accept this customary hostess gift from his subordinate, even though its cost is in excess of $10.

Example 4: For Christmas, a secretary may give his supervisor, and the supervisor may accept, a poinsettia plant purchased for $10 or less. The secretary may also invite his supervisor to a Christmas party in his home and the supervisor may attend.

(b) *Special, infrequent occasions.* A gift appropriate to the occasion may be given to an official superior or accepted from a subordinate or other employee receiving less pay:

(1) In recognition of infrequently occurring occasions of personal significance such as marriage, illness, or the birth or adoption of a child; or

(2) Upon occasions that terminate a subordinate-official superior relationship, such as retirement, resignation, or transfer.

Example 1: The administrative assistant to the personnel director of the Tennessee Valley Authority may send a $30 floral arrangement to the personnel director who is in the hospital recovering from surgery. The personnel director may accept the gift.

Example 2: A chemist employed by the Food and Drug Administration has been invited to the wedding of the lab director who is his official superior. He may give the lab director and his bride, and they may accept, a place setting in the couple's selected china pattern purchased for $70.

Example 3: Upon the occasion of the supervisor's retirement from Federal service, an employee of the Fish and Wildlife Service may give her supervisor a book of wildlife photographs which she purchased for $19. The retiring supervisor may accept the book.

(c) *Voluntary contributions.* An employee may solicit voluntary contributions of nominal amounts from fellow employees for an appropriate gift to an official superior and an employee may make a voluntary contribution of a nominal amount to an appropriate gift to an official superior:

(1) On a special, infrequent occasion as described in paragraph (b) of this section; or

(2) On an occasional basis, for items such as food and refreshments to be shared in the office among several employees.

An employee may accept such gifts to which a subordinate or other employee receiving less pay than himself has contributed.

Example 1: To mark the occasion of his retirement, members of the immediate staff of the Under Secretary of the Army would like to give him a party and provide him with a gift certificate. They may distribute an announcement of the party and include a nominal amount for a retirement gift in the fee for the party.

Example 2: The General Counsel of the National Endowment for the Arts may not collect contributions for a Christmas gift for the Chairman. Christmas occurs annually and is not an occasion of personal significance.

Example 3: Subordinates may not take up a collection for a gift to an official superior on the occasion of the superior's swearing in or promotion to a higher grade position within the supervisory chain of that organization. These are not events that mark the termination of the subordinate-official superior relationship, nor are they events of personal significance within the meaning of § 2635.304(b). However, subordinates may take up a collection and employees may contribute $3 each to buy refreshments to be consumed by everyone in the immediate office to mark either such occasion.

Example 4: Subordinates may each contribute a nominal amount to a fund to give a gift to an official superior upon the occasion of that superior's transfer or promotion to a position outside the organization.

Example 5: An Assistant Secretary at the Department of the Interior is getting married. His secretary has decided that a microwave oven would be a nice gift from his staff and has informed each of the Assistant Secretary's subordinates that they should contribute $5 for the gift. Her method of collection is improper. Although she may recommend a $5 contribution, the recommendation must be coupled with a statement that the employee whose contribution is solicited is free to contribute less or nothing at all.

Subpart D—Conflicting Financial Interests

§ 2635.401 Overview.

This subpart contains two provisions relating to financial interests. One is a disqualification requirement and the other is a prohibition on acquiring or continuing to hold specific financial interests. An employee may acquire or hold any financial interest not prohibited by § 2635.403. Notwithstanding that his acquisition or holding of a particular interest is proper, an employee is prohibited in accordance with § 2635.402 of this subpart from participating in an official capacity in any particular matter in which, to his knowledge, he or any person whose interests are imputed to him has a financial interest, if the particular matter will have a direct and predictable effect on that interest.

§ 2635.402 Disqualifying financial interests.

(a) *Statutory prohibition.* An employee is prohibited by criminal statute, 18 U.S.C. 208(a), from participating personally and substantially in an official capacity in any particular matter in which, to his knowledge, he or any person whose interests are imputed to him under this statute has a financial interest, if the particular matter will have a direct and predictable effect on that interest.

Note: Standards applicable when seeking non-Federal employment are contained in subpart F of this part and, if followed, will ensure that an employee does not violate 18 U.S.C. 208(a) or this section when he is negotiating for or has an arrangement concerning future employment. In all other cases where the employee's participation would violate 18 U.S.C. 208(a), an employee shall disqualify himself from participation in the matter in accordance with paragraph (c) of this section or obtain a waiver, as described in paragraph (d) of this section.

(b) *Definitions.* For purposes of this section, the following definitions shall apply:

(1) *Direct and predictable effect.* (i) A particular matter will have a *direct* effect on a financial interest if there is a close causal link between any decision or action to be taken in the matter and any expected effect of the matter on the financial interest. An effect may be direct even though it does not occur immediately. A particular matter will not have a direct effect on a financial interest, however, if the chain of causation is attenuated or is contingent upon the occurrence of events that are speculative or that are independent of, and unrelated to, the matter. A particular matter that has an effect on a financial interest only as a consequence of its effects on the general economy does not have a direct effect within the meaning of this subpart.

(ii) A particular matter will have a predictable effect if there is a real, as opposed to a speculative possibility that the matter will affect the financial interest. It is not necessary, however, that the magnitude of the gain or loss be known, and the dollar amount of the gain or loss is immaterial.

Note: If a particular matter involves a specific party or parties, generally the matter will at most only have a direct and predictable effect, for purposes of this subpart, on a financial interest of the employee in or with a party, such as the employee's interest by virtue of owning stock. There may, however, be some situations in which, under the above standards, a particular matter will have a direct and predictable effect on an employee's financial interests in or with a nonparty. For example, if a party is a corporation, a particular matter may also have a direct and predictable effect on an employee's financial interests through ownership of stock in an affiliate, parent, or subsidiary of that party. Similarly, the disposition of a protest against the award of a contract to a particular company may also have a direct and predictable effect on an employee's financial interest in another company listed as a subcontractor in the proposal of one of the competing offerors.

Example 1: An employee of the National Library of Medicine at the National Institutes of Health has just been asked to serve on the technical evaluation panel to review proposals for a new library computer search system. DEF Computer Corporation, a closely held company in which he and his wife own a majority of the stock, has submitted a proposal. Because award of the systems contract to DEF or to any other offeror will have a direct and predictable effect on both his and his wife's financial interests, the employee cannot participate on the technical evaluation team unless his disqualification has been waived.

Example 2: Upon assignment to the technical evaluation panel, the employee in the preceding example finds that DEF Computer Corporation has not submitted a proposal. Rather, LMN Corp., with which DEF competes for private sector business, is one of the six offerors. The employee is not disqualified from serving on the technical evaluation panel. Any effect on the employee's financial interests as a result of the agency's decision to award or not award the systems contract to LMN would be at most indirect and speculative.

(2) *Imputed interests.* For purposes of 18 U.S.C. 208(a) and this subpart, the financial interests of the following persons will serve to disqualify an employee to the same extent as if they were the employee's own interests:

(i) The employee's spouse;

(ii) The employee's minor child;

(iii) The employee's general partner;

(iv) An organization or entity which the employee serves as officer, director, trustee, general partner or employee; and

(v) A person with whom the employee is negotiating for or has an arrangement concerning prospective employment. (Employees who are seeking other employment should refer to and comply with the standards in subpart F of this part).

Example 1: An employee of the Department of Education serves without compensation on the board of directors of Kinder World, Inc., a nonprofit corporation that engages in good works. Even though her personal financial interests will not be affected, the employee must disqualify herself from participating in the review of a grant application submitted by Kinder World. Award or denial of the grant will affect the financial interests of Kinder World and its financial interests are imputed to her as a member of its board of directors.

Example 2: The spouse of an employee of the Food and Drug Administration has obtained a position with a well established biomedical research company. The company has developed an artificial limb for which it is seeking FDA approval and the employee would ordinarily be asked to participate in the FDA's review and approval process. The spouse is a salaried employee of the company and has no direct ownership interest in the company. Nor does she have an indirect ownership interest, as would be the case, for example, if she were participating in a pension plan that held stock in the company. Her position with the company is such that the granting or withholding of FDA approval will not have a direct and predictable effect on her salary or on her continued employment with the company. Since the FDA approval process will not affect his spouse's financial interests, the employee is not disqualified under § 2635.402 from participating in that process. Nevertheless, the financial interests of the spouse's employer may be disqualifying under the impartiality principle, as implemented at § 2635.502.

(3) *Particular matter.* The term *particular matter* encompasses only matters that involve deliberation, decision, or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons. Such a matter is covered by this subpart even if it does not involve formal parties and may include governmental action such as legislation or policy-making that is narrowly focused on the interests of such a discrete and identifiable class of persons. The term particular matter, however, does not extend to the consideration or adoption of broad policy options that are directed to the interests of a large and diverse group of persons. The particular matters covered by this subpart include a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation or arrest.

Example 1: The Internal Revenue Service's amendment of its regulations to change the manner in which depreciation is calculated is not a particular matter, nor is the Social Security Administration's consideration of changes to its appeal procedures for disability claimants.

Example 2: Consideration by the Interstate Commerce Commission of regulations establishing safety standards for trucks on interstate highways involves a particular matter.

(4) *Personal and substantial.* To participate *personally* means to participate directly. It includes the direct and active supervision of the participation of a subordinate in the matter. To participate *substantially* means that the employee's involvement is of significance to the matter.

Participation may be substantial even though it is not determinative of the outcome of a particular matter. However, it requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to a matter, but also on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participating in a critical step may be substantial. Personal and substantial participation may occur when, for example, an employee participates through decision, approval, disapproval, recommendation, investigation or the rendering of advice in a particular matter.

(c) *Disqualification.* Unless the employee is authorized to participate in the particular matter by virtue of a waiver described in paragraph (d) of this section or because the interest has been divested in accordance with paragraph (e) of this section, an employee shall disqualify himself from participating in a particular matter in which, to his knowledge, he or a person whose interests are imputed to him has a financial interest, if the particular matter will have a direct and predictable effect on that interest. Disqualification is accomplished by not participating in the particular matter.

(1) *Notification.* An employee who becomes aware of the need to disqualify himself from participation in a particular matter to which he has been assigned should notify the person responsible for his assignment. An employee who is responsible for his own assignment should take whatever steps are necessary to ensure that he does not participate in the matter from which he is disqualified. Appropriate oral or written notification of the employee's disqualification may be made to coworkers by the employee or a supervisor to ensure that the employee is not involved in a matter from which he is disqualified.

(2) *Documentation.* An employee need not file a written disqualification statement unless he is required by part 2634 of this chapter to file written evidence of compliance with an ethics agreement with the Office of Government Ethics or is asked by an agency ethics official or the person responsible for his assignment to file a written disqualification statement. However, an employee may elect to create a record of his actions by providing written notice to a supervisor or other appropriate official.

Example 1: An Assistant Secretary of the Department of the Interior owns recreational property that borders on land which is being considered for annexation to a national park. Annexation would directly and predictably increase the value of her vacation property and, thus, she is disqualified from participating in any way in the Department's deliberations or decisions regarding the annexation. Because she is responsible for determining which matters she will work on, she may accomplish her disqualification merely by ensuring that she does not participate in the matter. Because of the level of her position, however, the Assistant Secretary might be wise to establish a record that she has acted properly by providing a written disqualification statement to an official superior and by providing written notification of the disqualification to subordinates to ensure that they do not raise or discuss with her any issues related to the annexation.

(d) *Waiver of disqualification.* An employee who would otherwise be disqualified by 18 U.S.C. 208(a) may be permitted to participate in a particular matter where the otherwise disqualifying financial interest is the subject of a regulatory or individual waiver described in this paragraph, or results from certain Indian birthrights as described in 18 U.S.C. 208(b)(4).

(1) *Regulatory waivers.* Under 18 U.S.C. 208(b)(2), regulatory waivers of general applicability may be issued by the Office of Government Ethics based on its determination that particular interests are too remote or too inconsequential to affect the integrity of the services of the employees to whom the waivers apply. Pending issuance of superseding regulatory waivers under this authority, agency regulatory waivers issued under 18 U.S.C. 208(b)(2) as in effect prior to November 30, 1989 continue to apply.

(2) *Individual waivers.* An individual waiver enabling the employee to participate in one or more particular matters may be issued under 18 U.S.C. 208(b)(1) if, in advance of the employee's participation:

(i) The employee:

(A) Advises the Government official responsible for the employee's appointment (or other Government official to whom authority to issue such a waiver for the employee has been delegated) about the nature and circumstances of the particular matter or matters; and

(B) Makes full disclosure to such official of the nature and extent of the disqualifying financial interest; and

(ii) Such official determines, in writing, that the employee's financial interest in the particular matter or matters is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such employee.

(3) *Federal advisory committee member waivers.* An individual waiver may be issued under 18 U.S.C. 208(b)(3) to a special Government employee serving on, or under consideration for appointment to, an advisory committee within the meaning of the Federal Advisory Committee Act if the Government official responsible for the employee's appointment (or other Government official to whom authority to issue such a waiver for the employee has been delegated):

(i) Reviews the financial disclosure report filed by the special Government employee pursuant to the Ethics in Government Act of 1978; and

(ii) Certifies in writing that the need for the individual's services outweighs the potential for a conflict of interest created by the otherwise disqualifying financial interest.

(4) *Consultation and notification regarding waivers.* When practicable, an official is required to consult formally or informally with the Office of Government Ethics prior to granting a waiver referred to in paragraph (d)(2) or (3) of this section. A copy of each such waiver is to be forwarded to the Director of the Office of Government Ethics.

(e) *Divestiture of a disqualifying financial interest.* Upon sale or other divestiture of the asset or other interest that causes his disqualification from participation in a particular matter, 18 U.S.C. 208(a) and paragraph (c) of this section will no longer prohibit the employee's participation in the matter.

(1) *Voluntary divestiture.* An employee who would otherwise be disqualified from participation in a particular matter may voluntarily sell or otherwise divest himself of the interest that causes the disqualification.

(2) *Directed divestiture.* An employee may be required to sell or otherwise divest himself of the disqualifying financial interest if his continued holding of that interest is prohibited by statute or by agency supplemental regulation issued in accordance with § 2635.403(a), or if the agency determines in accordance with § 2635.403(b) that a substantial conflict exists between the financial interest and the employee's duties or accomplishment of the agency's mission.

(3) *Eligibility for special tax treatment.* An employee who is directed to divest an interest may be eligible to defer the tax consequences of divestiture under subpart J of part 2634 of this chapter. An employee who divests before obtaining a certificate of divestiture will not be eligible for this special tax treatment.

(f) *Official duties that give rise to potential conflicts.* Where an employee's official duties create a substantial likelihood that the employee may be assigned to a particular matter from which he is disqualified, the employee should advise his supervisor or other person responsible for his assignments of that potential so that conflicting assignments can be avoided, consistent with the agency's needs.

§ 2635.403 Prohibited financial interests.

An employee shall not acquire or hold any financial interest that he is prohibited from acquiring or holding by statute, by agency regulation issued in accordance with paragraph (a) of this section or by reason of an agency determination of substantial conflict under paragraph (b) of this section.

Note: There is no statute of Governmentwide applicability prohibiting employees from holding or acquiring any financial interest. Statutory restrictions, if any, are contained in agency statutes which, in some cases, may be implemented by agency regulations issued independent of this part.

(a) *Agency regulation prohibiting certain financial interests.* An agency may, by supplemental agency regulation, prohibit or restrict the acquisition or holding of a financial interest or a class of financial interests by agency employees, or any category of agency employees, and the spouses and minor children of those employees, based on the agency's determination that the acquisition or holding of such financial interests would cause a reasonable person to question the impartiality and objectivity with which agency programs are administered. Where the agency restricts or prohibits the holding of certain financial interests by its employees' spouses or minor children, any such prohibition or restriction shall be based on a determination that there is a direct and appropriate nexus between the prohibition or restriction as applied to spouses and minor children and the efficiency of the service.

Note: Any prohibition on acquiring or holding a specific financial interest contained in an agency regulation, instruction or other issuance in effect prior to the effective date of this part shall, for employees of that agency, constitute a prohibited financial interest for purposes of this paragraph for one year after the effective date of this part or until issuance of an agency supplemental regulation, whichever occurs first.

(b) *Agency determination of substantial conflict.* An agency may prohibit or restrict an individual employee from acquiring or holding a financial interest or a class of financial interests based upon the agency designee's determination that the holding of such interest or interests will:

(1) Require the employee's disqualification from matters so central or critical to the performance of his official duties that the employee's ability to perform the duties of his position would be materially impaired; or

(2) Adversely affect the efficient accomplishment of the agency's mission because another employee cannot be readily assigned to perform work from which the employee would be disqualified by reason of the financial interest.

Example 1: An Air Force employee who owns stock in a major aircraft engine manufacturer is being considered for promotion to a position that involves responsibility for development of a new fighter airplane. If the agency determined that engineering and other decisions about the Air Force's requirements for the fighter would directly and predictably affect his financial interests, the employee could not, by virtue of 18 U.S.C. 208(a), perform these significant duties of the position while retaining his stock in the company. The agency can require the employee to sell his stock as a condition of being selected for the position rather than allowing him to disqualify himself in particular matters.

(c) *Definition of financial interest.* For purposes of this section:

(1) Except as provided in paragraph (c)(2) of this section, the term financial interest is limited to financial interests that are owned by the employee or by the employee's spouse or minor children. However, the term is not limited to only those financial interests that would be disqualifying under 18 U.S.C. 208(a) and § 2635.402. The term includes any current or contingent ownership, equity, or security interest in real or personal property or a business and may include an indebtedness or compensated employment relationship. It thus includes, for example, interests in the nature of stocks, bonds, partnership interests, fee and leasehold interests, mineral and other property rights, deeds of trust, and liens, and extends to any right to purchase or acquire any such interest, such as a stock option or commodity future. It does not include a future interest created by someone other than the employee, his spouse, or dependent child or any right as a beneficiary of an estate that has not been settled.

Example 1: A regulatory agency has concluded that ownership by its employees of stock in entities regulated by the agency would significantly diminish public confidence in the agency's performance of its regulatory functions and thereby interfere with the accomplishment of its mission. In its supplemental agency regulations, the agency may prohibit its employees from acquiring or continuing to hold stock in regulated entities.

Example 2: An agency that insures bank deposits may, by supplemental agency regulation, prohibit its employees who are bank examiners from obtaining loans from banks they examine. Examination of a member bank could have no effect on an employee's fixed obligation to repay a loan from that bank and, thus, would not affect an employee's financial interests so as to require disqualification under § 2635.402. Nevertheless, a loan from a member bank is a discrete financial interest within the meaning of § 2635.403(c) that may, when appropriate, be prohibited by supplemental agency regulation.

(2) The term financial interest includes service, with or without compensation, as an officer, director, trustee, general partner or employee of any person, including a nonprofit entity, whose financial interests are imputed to the employee under § 2635.402(b)(2)(iii) or (iv).

Example 1. The Foundation for the Preservation of Wild Horses maintains herds of horses that graze on public and private lands. Because its costs are affected by Federal policies regarding grazing permits, the Foundation routinely comments on all proposed rules governing use of Federal grasslands issued by the Bureau of Land Management. BLM may require an employee to resign his uncompensated position as Vice President of the Foundation as a condition of his promotion to a policy-level position within the Bureau rather than allowing him to rely on disqualification in particular cases.

(d) *Reasonable period to divest or terminate.* Whenever an agency directs divestiture of a financial interest under paragraph (a) or (b) of this section, the employee shall be given a reasonable period of time, considering the nature of his particular duties and the nature and marketability of the interest, within which to comply with the agency's direction. Except in cases of unusual hardship, as determined by the agency, a reasonable period shall not exceed 90 days from the date divestiture is first directed. However, as long as the employee continues to hold the financial interest, he remains subject to any restrictions imposed by this subpart.

(e) *Eligibility for special tax treatment.* An employee required to sell or otherwise divest a financial interest may be eligible to defer the tax consequences of divestiture under subpart J of part 2634 of this chapter.

Subpart E—Impartiality in Performing Official Duties

§ 2635.501 Overview.

(a) This subpart contains two provisions intended to ensure that an employee takes appropriate steps to avoid an appearance of loss of impartiality in the performance of his official duties. Under § 2635.502, unless he receives prior authorization, an employee should not participate in a particular matter involving specific parties which he knows is likely to affect the financial interests of a member of his household, or in which he knows a person with whom he has a covered relationship is or represents a party, if he determines that a reasonable person with knowledge of the relevant facts would question his impartiality in the matter. An employee who is concerned that other circumstances would raise a question regarding his impartiality should use the process described in § 2635.502 to determine whether he should or should not participate in a particular matter.

(b) Under § 2635.503, an employee who has received an extraordinary severance or other payment from a former employer prior to entering Government service is subject, in the absence of a waiver, to a two-year period of disqualification from participation in particular matters in which that former employer is or represents a party.

Note: Questions regarding impartiality necessarily arise when an employee's official duties impact upon the employee's own financial interests or those of certain other persons, such as the employee's spouse or minor child. An employee is prohibited by criminal statute, 18 U.S.C. 208(a), from participating personally and substantially in an official capacity in any particular matter in which, to his knowledge, he, his spouse,

general partner or minor child has a financial interest, if the particular matter will have a direct and predictable effect on that interest. The statutory prohibition also extends to an employee's participation in a particular matter in which, to his knowledge, an organization in which the employee is serving as officer, director, trustee, general partner or employee, or with whom he is negotiating or has an arrangement concerning prospective employment has a financial interest. Where the employee's participation in a particular matter would affect any one of these financial interests, the standards set forth in subparts D or F of this part apply and only a statutory waiver, as described respectively in §§ 2635.402(d) and 2635.605(a), will enable the employee to participate in that matter. The authorization procedures in § 2635.502(d) may not be used to authorize an employee's participation in any such matter. Where the employee complies with all terms of the waiver, the granting of a statutory waiver will be deemed to constitute a determination that the interest of the Government in the employee's participation outweighs the concern that a reasonable person may question the integrity of agency programs and operations.

§ 2635.502 Personal and business relationships.

(a) *Consideration of appearances by the employee.* Where an employee knows that a particular matter involving specific parties is likely to have a direct and predictable effect on the financial interest of a member of his household, or knows that a person with whom he has a covered relationship is or represents a party to such matter, and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter unless he has informed the agency designee of the appearance problem and received authorization from the agency designee in accordance with paragraph (d) of this section.

(1) In considering whether a relationship would cause a reasonable person to question his impartiality, an employee may seek the assistance of his supervisor, an agency ethics official or the agency designee.

(2) An employee who is concerned that circumstances other than those specifically described in this section would raise a question regarding his impartiality should use the process described in this section to determine whether he should or should not participate in a particular matter.

(b) *Definitions.* For purposes of this section:

(1) An employee has a *covered relationship* with:

(i) A person, other than a prospective employer described in § 2635.603(c), with whom the employee has or seeks a business, contractual or other financial relationship that involves other than a routine consumer transaction;

Note: An employee who is seeking employment within the meaning of § 2635.603 shall comply with subpart F of this part rather than with this section.

(ii) A person who is a member of the employee's household, or who is a relative with whom the employee has a close personal relationship;

(iii) A person for whom the employee's spouse, parent or dependent child is, to the employee's knowledge, serving or seeking to serve as an officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee;

(iv) Any person for whom the employee has, within the last year, served as officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee; or

(v) An organization, other than a political party described in 26 U.S.C. 527(e), in which the employee is an active participant. Participation is active if, for example, it involves service as an official of the organization or in a capacity similar to that of a committee or subcommittee chairperson or spokesperson, or participation in directing the activities of the organization. In other cases, significant time devoted to promoting specific programs of the organization, including coordination of fundraising efforts, is an indication of active participation. Payment of dues or the donation or solicitation of financial support does not, in itself, constitute active participation.

Note: Nothing in this section shall be construed to suggest that an employee should not participate in a matter because of his political, religious or moral views.

(2) *Direct and predictable effect* has the meaning set forth in § 2635.402(b)(1).

(3) *Particular matter involving specific parties* has the meaning set forth in § 2637.102(a)(7) of this chapter.

Example 1: An employee of the General Services Administration has made an offer to purchase a restaurant owned by a local developer. The developer has submitted an offer in response to a GSA solicitation for lease of office space. Under the circumstances, she would be correct in concluding that a reasonable person would be likely to question her impartiality if she were to participate in evaluating that developer's or its competitor's lease proposal.

Example 2: An employee of the Department of Labor is providing technical assistance in drafting occupational safety and health legislation that will affect all employers of five or more persons. His wife is employed as an administrative assistant by a large corporation that will incur additional costs if the proposed legislation is enacted. Because the legislation is not a particular matter involving specific parties, the employee may continue to work on the legislation and need not be concerned that his wife's employment with an affected corporation would raise a question concerning his impartiality.

Example 3: An employee of the Defense Logistics Agency who has responsibilities for testing avionics being produced by an Air Force contractor has just learned that his sister-in-law has accepted employment as an engineer with the contractor's parent corporation. Where the parent corporation is a conglomerate, the employee could reasonably conclude that, under the circumstances, a reasonable person would not be likely to question his impartiality if he were to continue to perform his test and evaluation responsibilities.

Example 4: An engineer has just resigned from her position as vice president of an electronics company in order to accept employment with the Federal Aviation Administration in a position involving procurement responsibilities. Although the employee did not receive an extraordinary payment in connection with her resignation and has severed all financial ties with the firm, under the circumstances she would be correct in concluding that her former service as an officer of the company would be likely to cause a reasonable person to question her impartiality if she were to participate in the administration of a DOT contract for which the firm is a first-tier subcontractor.

Example 5: An employee of the Internal Revenue Service is a member of a private organization whose purpose is to restore a Victorian-era railroad station and she chairs its annual fundraising drive. Under the circumstances, the employee would be correct in concluding that her active membership in the organization would be likely to cause a reasonable person to question her impartiality if she were to participate in an IRS determination regarding the tax-exempt status of the organization.

(c) *Determination by agency designee.* Where he has information concerning a potential appearance problem arising from the financial interest of a member of the employee's household in a particular matter involving specific parties, or from the role in such matter of a person with whom the employee has a covered relationship, the agency designee may make an independent determination as to whether a reasonable person with knowledge of the relevant facts would be likely to question the employee's impartiality in the matter. Ordinarily, the agency designee's determination will be initiated by information provided by the employee pursuant to paragraph (a) of this section. However, at any time, including after the employee has disqualified himself from participation in a matter pursuant to paragraph (e) of this section, the agency designee may make this determination on his own initiative or when requested by the employee's supervisor or any other person responsible for the employee's assignment.

(1) If the agency designee determines that the employee's impartiality is likely to be questioned, he shall then determine, in accordance with paragraph (d) of this section, whether the employee should be authorized to participate in the matter. Where the agency designee determines that the employee's participation should not be authorized, the employee will be disqualified from participation in the matter in accordance with paragraph (e) of this section.

(2) If the agency designee determines that the employee's impartiality is not likely to be questioned, he may advise the employee, including an employee who has reached a contrary conclusion under paragraph (a) of this section, that the employee's participation in the matter would be proper.

(d) *Authorization by agency designee.* Where an employee's participation in a particular matter involving specific parties would not violate 18 U.S.C. 208(a), but would raise a question in the mind of a reasonable person about his impartiality, the agency designee may authorize the employee to participate in the matter based on a determination, made in light of all relevant circumstances, that the interest of the Government in the employee's participation outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations. Factors which may be taken into consideration include:

(1) The nature of the relationship involved;

(2) The effect that resolution of the matter would have upon the financial interests of the person involved in the relationship;

(3) The nature and importance of the employee's role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter;

(4) The sensitivity of the matter;

(5) The difficulty of reassigning the matter to another employee; and

(6) Adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that a reasonable person would question the employee's impartiality.

Authorization by the agency designee shall be documented in writing at the agency designee's discretion or when requested by the employee. An employee who has been authorized to participate in a particular matter involving specific parties may not thereafter disqualify himself from participation in the matter on the basis of an appearance problem involving the same circumstances that have been considered by the agency designee.

Example 1: The Deputy Director of Personnel for the Department of the Treasury and an attorney with the Department's Office of General Counsel are general partners in a real estate partnership. The Deputy Director advises his supervisor, the Director of Personnel, of the relationship upon being assigned to a selection panel for a position for which his partner has applied. If selected, the partner would receive a substantial increase in salary. The agency designee cannot authorize the Deputy Director to participate on the panel under the authority of this section since the Deputy Director is prohibited by criminal statute, 18 U.S.C. 208(a), from participating in a particular matter affecting the financial interest of a person who is his general partner. See § 2635.402.

Example 2: A new employee of the Securities and Exchange Commission is assigned to an investigation of insider trading by the brokerage house where she had recently been employed. Because of the sensitivity of the investigation, the agency designee may be unable to conclude that the Government's interest in the employee's participation in the investigation outweighs the concern that a reasonable person may question the integrity of the investigation, even though the employee has severed all financial ties with the company. Based on consideration of all relevant circumstances, the agency designee might determine, however, that it is in the interest of the Government for the employee to pass on a routine filing by the particular brokerage house.

Example 3: An Internal Revenue Service employee involved in a long and complex tax audit is advised by her son that he has just accepted an entry-level management position with a corporation whose taxes are the subject of the audit. Because the audit is essentially complete and because the employee is the only one with an intimate knowledge of the case, the agency designee might determine, after considering all relevant circumstances, that it is in the Government's interest for the employee to complete the audit, which is subject to additional levels of review.

(e) *Disqualification.* Unless the employee is authorized to participate in the matter under paragraph (d) of this section, an employee shall not participate in a particular matter involving specific parties when he or the agency designee has concluded, in accordance with paragraph (a) or (c) of this section, that the financial interest of a member of the employee's household, or the role of a person with whom he has a covered relationship, is likely to raise a question in the mind of a reasonable person about his impartiality. Disqualification is accomplished by not participating in the matter.

(1) *Notification.* An employee who becomes aware of the need to disqualify himself from participation in a particular matter involving specific parties to which he has been assigned should notify the person responsible for his assignment. An employee who is responsible for his own assignment should take whatever steps are necessary to ensure that he does not participate in the matter from which he is disqualified. Appropriate oral or written notification of the employee's disqualification may be made to coworkers by the employee or a supervisor to ensure that the employee is not involved in a particular matter involving specific parties from which he is disqualified.

(2) *Documentation.* An employee need not file a written disqualification statement unless he is required by part 2634 of this chapter to file written evidence of compliance with an ethics agreement with the Office of Government Ethics or is specifically asked by an agency ethics official or the person responsible for his assignment to file a written disqualification statement. However, an employee may elect to create a record of his actions by providing written notice to a supervisor or other appropriate official.

(f) *Relevant considerations.* An employee's reputation for honesty and integrity is not a relevant consideration for purposes of any determination required by this section.

§ 2635.503 Extraordinary payments from former employers.

(a) *Disqualification requirement.* Except as provided in paragraph (c) of this section, an employee shall be disqualified for two years from participating in any particular matter in which a former employer is a party or represents a party if he received an extraordinary payment from that person prior to entering Government service. The two-year period of disqualification begins to run on the date that the extraordinary payment is received.

Example 1: Following his confirmation hearings and one month before his scheduled swearing in, a nominee to the position of Assistant Secretary of a department received an extraordinary payment from his employer. For one year and 11 months after his swearing in, the Assistant Secretary may not participate in any particular matter to which his former employer is a party.

Example 2: An employee received an extraordinary payment from her former employer, a coal mine operator, prior to entering on duty with the Department of the Interior. For two years thereafter, she may not participate in a determination regarding her former employer's obligation to reclaim a particular mining site, because her former employer is a party to the matter. However, she may help to draft reclamation legislation affecting all coal mining operations because this legislation does not involve any parties.

(b) *Definitions.* For purposes of this section, the following definitions shall apply:

(1) *Extraordinary payment* means any item, including cash or an investment interest, with a value in excess of $10,000, which is paid:

(i) On the basis of a determination made after it became known to the former employer that the individual was being considered for or had accepted a Government position; and

(ii) Other than pursuant to the former employer's established compensation, partnership, or benefits program. A compensation, partnership, or benefits program will be deemed an established program if it is contained in bylaws, a contract or other written form, or if there is a history of similar payments made to others not entering into Federal service.

Example 1: The vice president of a small corporation is nominated to be an ambassador. In recognition of his service to the corporation, the board of directors votes to pay him $50,000 upon his confirmation in addition to the regular severance payment provided for by the corporate bylaws. The regular severance payment is not an extraordinary payment. The gratuitous payment of $50,000 is an extraordinary payment, since the corporation had not made similar payments to other departing officers.

(2) *Former employer* includes any person which the employee served as an officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee.

(c) *Waiver of disqualification.* The disqualification requirement of this section may be waived based on a finding that the amount of the payment was not so substantial as to cause a reasonable person to question the employee's ability to act impartially in a matter in which the former employer is or represents a party. The waiver shall be in writing and may be given only by the head of the agency or, where the recipient of the payment is the head of the agency, by the President or his designee. Waiver authority may be delegated by agency heads to any person who has been delegated authority to issue individual waivers under 18 U.S.C. 208(b) for the employee who is the recipient of the extraordinary payment.

Subpart F—Seeking Other Employment

§ 2635.601 Overview.

This subpart contains a disqualification requirement that applies to employees when seeking employment with persons who otherwise would be affected by the performance or nonperformance of the employees' official duties. Specifically, it addresses the requirement of 18 U.S.C. 208(a) that an employee disqualify himself from participation in any particular matter that will have a direct and predictable effect on the financial interests of a person "with whom he is negotiating or has any arrangement concerning prospective employment." Beyond this statutory requirement, it also addresses the issues of lack of impartiality that require disqualification from particular matters affecting the financial interest of a prospective employer when an employee's actions in seeking employment fall short of actual employment negotiations.

§ 2635.602 Applicability and related considerations.

To ensure that he does not violate 18 U.S.C. 208(a) or the principles of ethical conduct contained in § 2635.101(b), an employee who is seeking employment or who has an arrangement concerning prospective employment shall comply with the applicable disqualification requirements of §§ 2635.604 and 2635.606 if the employee's official duties would affect the financial interests of a prospective employer or of a person with whom he has an arrangement concerning prospective employment. Compliance with this subpart also will ensure that the employee does not violate subpart D or E of this part.

Note: An employee who is seeking employment with a person whose financial interests are not affected by the performance or nonperformance of his official duties has no obligation under this subpart. An employee may, however, be subject to other statutes which impose restrictions on employment contacts or discussions, such as 41 U.S.C. 423(b)(1), applicable to procurement officials, and 10 U.S.C. 2397a, applicable to certain employees of the Department of Defense.

(a) *Related employment restrictions*—(1) Outside employment while a Federal employee. An employee who is contemplating outside employment to be undertaken concurrently with his Federal employment must abide by any limitations applicable to his outside activities under subparts G and H of this part. He must also comply with any disqualification requirement that may be applicable under subpart D or E of this part as a result of his outside employment activities.

(2) *Post-employment restrictions.* An employee who is contemplating employment to be undertaken following the termination of his Federal employment should consult an agency ethics official to obtain advice regarding any post-employment restrictions that may be applicable. Regulations implementing the Governmentwide post-employment statute, 18 U.S.C. 207, are contained in parts 2637 and 2641 of this chapter. Employees are cautioned that they may be subject to additional statutory restrictions on their post-employment activities, such as 41 U.S.C. 423(f) applicable to procurement officials, 10 U.S.C. 2397b applicable to certain Department of Defense personnel and special statutes applicable to certain retired officers.

(b) *Interview trips and entertainment.* Where a prospective employer who is a prohibited source as defined in § 2635.203(d) offers to reimburse an employee's travel expenses, or provide other reasonable amenities incident to employment discussions, the employee may accept such amenities in accordance with § 2635.204(e)(3).

§ 2635.603 Definitions.

For purposes of this subpart:

(a) *Employment* means any form of non-Federal employment or business relationship involving the provision of personal services by the employee, whether to be undertaken at the same time as or subsequent to Federal employment. It includes but is not limited to personal services as an officer, director, employee, agent, attorney, consultant, contractor, general partner or trustee.

Example 1: An employee of the Bureau of Indian Affairs who has announced her intention to retire is approached by tribal representatives concerning a possible consulting contract with the tribe. The independent contractual relationship the tribe wishes to negotiate is employment for purposes of this subpart.

Example 2: An employee of the Department of Health and Human Services is invited to a meeting with officials of a nonprofit corporation to discuss the possibility of his serving as a member of the corporation's board of directors. Service, with or without compensation, as a member of the board of directors constitutes employment for purposes of this subpart.

(b) An employee is seeking employment once he has begun seeking employment within the meaning of paragraph (b)(1) of this section and until he is no longer seeking employment within the meaning of paragraph (b)(2) of this section.

(1) An employee has begun seeking employment if he has directly or indirectly:

(i) Engaged in negotiations for employment with any person. For these purposes, as for 18 U.S.C. 208(a), the term negotiations means discussion or communication with another person, or such person's agent or intermediary, mutually conducted with a view toward reaching an agreement regarding possible employment with that person. The term is not limited to discussions of specific terms and conditions of employment in a specific position;

(ii) Made an unsolicited communication to any person, or such person's agent or intermediary, regarding possible employment with that person. However, the employee has not begun seeking employment if that communication was:

(A) For the sole purpose of requesting a job application; or

(B) For the purpose of submitting a resume or other employment proposal to a person affected by the performance or nonperformance of the employee's duties only as part of an industry or other discrete class. The employee will be considered to have begun seeking employment upon receipt of any response indicating an interest in employment discussions; or

(iii) Made a response other than rejection to an unsolicited communication from any person, or such person's agent or intermediary, regarding possible employment with that person.

(2) An employee is no longer seeking employment when:

(i) The employee or the prospective employer rejects the possibility of employment and all discussions of possible employment have terminated; or

(ii) Two months have transpired after the employee's dispatch of an unsolicited resume or employment proposal, provided the employee has received no indication of interest in employment discussions from the prospective employer.

(3) For purposes of this definition, a response that defers discussions until the foreseeable future does not constitute rejection of an unsolicited employment overture, proposal, or resume nor rejection of a prospective employment possibility.

Example 1: An employee of the Health Care Financing Administration is complimented on her work by an official of a State Health Department who asks her to call if she is ever interested in leaving Federal service. The employee explains to the State official that she is very happy with her job at HCFA and is not interested in another job. She thanks him for his compliment regarding her work and adds that she'll remember his interest if she ever decides to leave the Government. The employee has rejected the unsolicited employment overture and has not begun seeking employment.

Example 2: The employee in the preceding example responds by stating that she cannot discuss future employment while she is working on a project affecting the State's health care funding but would like to discuss employment with the State when the project is completed. Because the employee has merely deferred employment discussions until the foreseeable future, she has begun seeking employment with the State Health Department.

Example 3: An employee of the Defense Contract Audit Agency is auditing the overhead accounts of an Army contractor. While at the contractor's headquarters, the head of the contractor's accounting division tells the employee that his division is thinking about hiring another accountant and asks whether the employee might be interested in leaving DCAA. The DCAA employee says he is interested in knowing what kind of work would be involved. They discuss the duties of the position the accounting division would like to fill and the DCAA employee's qualifications for the position. They do not discuss salary. The head of the division explains that he has not yet received authorization to fill the particular position and will get back to the employee when he obtains the necessary approval for additional staffing. The employee and the contractor's official have engaged in negotiations regarding possible employment. The employee has begun seeking employment with the Army contractor.

Example 4: An employee of the Occupational Safety and Health Administration helping to draft safety standards applicable to the textile industry has mailed his resume to 25 textile manufacturers. He has not begun seeking employment with any of the twenty-five. If he receives a response from one of the resume recipients indicating an interest in employment discussions, the employee will have begun seeking employment with the respondent at that time.

Example 5: A special Government employee of the Federal Deposit Insurance Corporation is serving on an advisory committee formed for the purpose of reviewing rules applicable to all member banks. She mails an unsolicited letter to a member bank offering her services as a contract consultant. She has not begun seeking employment with the bank until she receives some response indicating an interest in discussing her employment proposal. A letter merely acknowledging receipt of the proposal is not an indication of interest in employment discussions.

Example 6: A geologist employed by the U.S. Geological Survey has been working as a member of a team preparing the Government's case in an action brought by the Government against six oil companies. The geologist sends her resume to an oil company that is a named defendant in the action. The geologist has begun seeking employment with that oil company and will be seeking employment for two months from the date the resume was mailed. However, if she withdraws her application or is notified within the two-month period that her resume has been rejected, she will no longer be seeking employment with the oil company as of the date she makes such withdrawal or receives such notification.

(c) *Prospective employer* means any person with whom the employee is seeking employment. Where contacts that constitute seeking employment are made by or with an agent or other intermediary, the term prospective employer includes:

(1) A person who uses that agent or other intermediary for the purpose of seeking to establish an employment relationship with the employee if the agent identifies the prospective employer to the employee; and

(2) A person contacted by the employee's agent or other intermediary for the purpose of seeking to establish an employment relationship if the agent identifies the prospective employer to the employee.

Example 1: An employee of the Federal Aviation Administration has overall responsibility for airport safety inspections in a three-state area. She has retained an employment search firm to help her find another job. The search firm has just reported to the FAA employee that it has given her resume to and had promising discussions with two airport authorities within her jurisdiction. Even though the employee has not personally had employment discussions with either, each airport authority is her prospective employer. She began seeking employment with each upon learning its identity and that it has been given her resume.

(d) *Direct and predictable effect* and *particular matter* have the respective meanings set forth in § 2635.402(b) (1) and (3).

§ 2635.604 Disqualification while seeking employment.

(a) *Obligation to disqualify.* Unless the employee's participation is authorized in accordance with § 2635.605, the employee shall not participate in a particular matter that, to his knowledge, has a direct and predictable effect on the financial interests of a prospective employer with whom he is seeking employment within the meaning of § 2635.603(b). Disqualification is accomplished by not participating in the particular matter.

(b) *Notification.* An employee who becomes aware of the need to disqualify himself from participation in a particular matter to which he has been assigned should notify the person responsible for his assignment. An employee who is responsible for his own assignment should take whatever steps are necessary to ensure that he does not participate in the matter from which he is disqualified. Appropriate oral or written notification of the employee's disqualification may be made to coworkers by the employee or a supervisor to ensure that the employee is not involved in a matter from which he is disqualified.

(c) *Documentation.* An employee need not file a written disqualification statement unless he is required by part 2634 of this chapter to file written evidence of compliance with an ethics agreement with the Office of Government Ethics or is specifically asked by an agency ethics official or the person responsible for his assignment to file a written disqualification statement. However, an employee may elect to create a record of his actions by providing written notice to a supervisor or other appropriate official.

Example 1: An employee of the Department of Veterans Affairs is participating in the audit of a contract for laboratory support services. Before sending his resume to a lab which is a subcontractor under the VA contract, the employee should disqualify himself from participation in the audit. Since he cannot withdraw from participation in the contract audit without the approval of his supervisor, he should disclose his intentions to his supervisor in order that appropriate adjustments in his work assignments can be made.

Example 2: An employee of the Food and Drug Administration is contacted in writing by a pharmaceutical company concerning possible employment with the company. The employee is involved in testing a drug for which the company is seeking FDA approval. Before making a response that is not a rejection, the employee should disqualify himself from further participation in the testing. Where he has authority to ask his colleague to assume his testing responsibilities, he may accomplish his disqualification by transferring the work to that coworker. However, to ensure that his colleague and others with whom he had been working on the recommendations do not seek his advice regarding testing or otherwise involve him in the matter, it may be necessary for him to advise those individuals of his disqualification.

Example 3: The General Counsel of a regulatory agency wishes to engage in discussions regarding possible employment as corporate counsel of a regulated entity. Matters directly affecting the financial interests of the regulated entity are pending within the Office of General Counsel, but the General Counsel will not be called upon to act in any such matter because signature authority for that particular class of matters has been delegated to an Assistant General Counsel. Because the General Counsel is responsible for assigning work within the Office of General Counsel, he can in fact accomplish his disqualification by simply avoiding any involvement in matters affecting the regulated entity. However, because it is likely to be assumed by others that the General Counsel is involved in all matters within the cognizance of the Office of General Counsel, he would be wise to file a written disqualification statement with the Commissioners of the regulatory agency and provide his subordinates with written notification of his disqualification, or he may be specifically asked by an agency ethics official or the Commissioners to file a written disqualification statement.

Example 4: A scientist is employed by the National Science Foundation as a special Government employee to serve on a panel that reviews grant applications to fund research relating to deterioration of the ozone layer. She is discussing possible employment as a member of the faculty of a university that several years earlier received an NSF grant to study the effect of fluorocarbons, but has no grant application pending. As long as the university does not submit a new application for the panel's review, the employee would not have to take any action to effect disqualification.

(d) *Agency determination of substantial conflict.* Where the agency determines that the employee's action in seeking employment with a particular person will require his disqualification from matters so central or critical to the performance of his official duties that the employee's ability to perform the duties of his position would be materially impaired, the agency may allow the employee to take annual leave or leave without pay while seeking employment, or may take other appropriate administrative action.

§ 2635.605 Waiver or authorization permitting participation while seeking employment.

(a) *Waiver.* Where, as defined in § 2635.603(b)(1)(i), an employee is engaged in discussions that constitute employment negotiations for purposes of 18 U.S.C. 208(a), the employee may participate in a particular matter that has a direct and predictable effect on the financial interests of a prospective employer only after receiving a written waiver issued under the authority of 18 U.S.C. 208(b)(1) or (b)(3). These waivers are described in § 2635.402(d).

Example 1: An employee of the Department of Agriculture has had two telephone conversations with an orange grower regarding possible employment. They have discussed the employee's qualifications for a particular position with the grower, but have not yet discussed salary or other specific terms of employment. The employee is negotiating for employment within the meaning of 18 U.S.C. 208(a) and § 2635.603(b)(1)(i). In the absence of a written waiver issued under 18 U.S.C. 208(b)(1), she may not take official action on a complaint filed by a competitor alleging that the grower has shipped oranges in violation of applicable quotas.

(b) *Authorization by agency designee.* Where an employee is seeking employment within the meaning of § 2635.603(b)(1) (ii) or (iii), a reasonable person would be likely to question his impartiality if he were to participate in a particular matter that has a direct and predictable effect on the financial interests of any such prospective employer. The employee may participate in such matters only where the agency designee has authorized his participation in accordance with the standards set forth in § 2635.502(d).

Example 1: Within the past month, an employee of the Education Department mailed her resume to a university. She is thus seeking employment with the university within the meaning of § 2635.603(b)(1)(ii) even though she has received no reply. In the absence of specific authorization by the agency designee in accordance with § 2635.502(d), she may not participate in an assignment to review a grant application submitted by the university.

§ 2635.606 Disqualification based on an arrangement concerning prospective employment or otherwise after negotiations.

(a) *Employment or arrangement concerning employment.* An employee shall be disqualified from taking official action in a particular matter that has a direct and predictable effect on the financial interests of the person by whom he is employed or with whom he has an arrangement concerning future employment, unless authorized to participate in the matter by a written waiver issued under the authority of 18 U.S.C. 208 (b)(1) or (b)(3). These waivers are described in § 2635.402(d).

Example 1: A military officer has accepted a job with a defense contractor to begin in six months, after his retirement from military service. During the period that he remains with the Government, the officer may not participate in the administration of a contract with that particular defense contractor unless he has received a written waiver under the authority of 18 U.S.C. 208(b)(1).

Example 2: An accountant has just been offered a job with the Comptroller of the Currency which involves a two-year limited appointment. Her private employer, a large corporation, believes the job will enhance her skills and has agreed to give her a two-year unpaid leave of absence at the end of which she has agreed to return to work for the corporation. During the two-year period she is to be a COC employee, the accountant will have an arrangement concerning future employment with the corporation that will require her disqualification from participation in any particular matter that will have a direct and predictable effect on the corporation's financial interests.

(b) *Offer rejected or not made.* The agency designee for the purpose of § 2635.502(c) may, in an appropriate case, determine that an employee not covered by the preceding paragraph who has sought but is no longer seeking employment nevertheless shall be subject to a period of disqualification upon the conclusion of employment negotiations. Any such determination shall be based on a consideration of all the relevant factors, including those listed in § 2635.502(d), and a determination that the concern that a reasonable person may question the integrity of the agency's decisionmaking process outweighs the Government's interest in the employee's participation in the particular matter.

Example 1: An employee of the Securities and Exchange Commission was relieved of responsibility for an investigation of a broker-dealer while seeking employment with the law firm representing the broker-dealer in that matter. The firm did not offer her the partnership position she sought. Even though she is no longer seeking employment with the firm, she may continue to be disqualified from participating in the investigation based on a determination by the agency designee that the concern that a reasonable person might question whether, in view of the history of the employment negotiations, she could act impartially in the matter outweighs the Government's interest in her participation.

Subpart G—Misuse of Position

§ 2635.701 Overview.

This subpart contains provisions relating to the proper use of official time and authority, and of information and resources to which an employee has access because of his Federal employment. This subpart sets forth standards relating to:

(a) Use of public office for private gain;

(b) Use of nonpublic information;

(c) Use of Government property; and

(d) Use of official time.

§ 2635.702 Use of public office for private gain.

An employee shall not use his public office for his own private gain, for the endorsement of any product, service or enterprise, or for the private gain of friends, relatives, or persons with whom the employee is affiliated in a nongovernmental capacity, including nonprofit organizations of which the employee is an officer or member, and persons with whom the employee has or seeks employment or business relations. The specific prohibitions set forth in paragraphs (a) through (d) of this section apply this general standard, but are not intended to be exclusive or to limit the application of this section.

(a) *Inducement or coercion of benefits.* An employee shall not use or permit the use of his Government position or title or any authority associated with his public office in a manner that is intended to coerce or induce another person, including a subordinate, to provide any benefit, financial or otherwise, to himself or to friends, relatives, or persons with whom the employee is affiliated in a nongovernmental capacity.

Example 1: Offering to pursue a relative's consumer complaint over a household appliance, an employee of the Securities and Exchange Commission called the general counsel of the manufacturer and, in the course of discussing the problem, stated that he worked at the SEC and was responsible for reviewing the company's filings. The employee violated the prohibition against use of public office for private gain by invoking his official authority in an attempt to influence action to benefit his relative.

Example 2: An employee of the Department of Commerce was asked by a friend to determine why his firm's export license had not yet been granted by another office within the Department of Commerce. At a

Government position or title or any authority associated with his public office to endorse any product, service or enterprise except:

(1) In furtherance of statutory authority to promote products, services or enterprises; or

(2) As a result of documentation of compliance with agency requirements or standards or as the result of recognition for achievement given under an agency program of recognition for accomplishment in support of the agency's mission.

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Example 1: A Commissioner of the Consumer Product Safety Commission may not appear in a television commercial in which she endorses an electrical appliance produced by her former employer, stating that it has been found by the CPSC to be safe for residential use.

Example 2: A Foreign Commercial Service officer from the Department of Commerce is asked by a United States telecommunications company to meet with representatives of the Government of Spain, which is in the process of procuring telecommunications services and equipment. The company is bidding against five European companies and the statutory mission of the Department of Commerce includes assisting the export activities of U.S. companies. As part of his official duties, the Foreign Commercial Service officer may meet with Spanish officials and explain the advantages of procurement from the United States company.

Example 3: The Administrator of the Environmental Protection Agency may sign a letter to an oil company indicating that its refining operations are in compliance with Federal air quality standards even though he knows that the company has routinely displayed letters of this type in television commercials portraying it as a "trustee of the environment for future generations."

Example 4: An Assistant Attorney General may not use his official title or refer to his Government position in a book jacket endorsement of a novel about organized crime written by an author whose work he admires. Nor may he do so in a book review published in a newspaper.

(d) *Performance of official duties affecting a private interest.* To ensure

department-level staff meeting, the employee raised as a matter for official inquiry the delay in approval of the particular license and asked that the particular license be expedited. The official used her public office in an attempt to benefit her friend and, in acting as her friend's agent for the purpose of pursuing the export license with the Department of Commerce, may also have violated 18 U.S.C. 205.

(b) *Appearance of governmental sanction.* Except as otherwise provided in this part, an employee shall not use or permit the use of his Government position or title or any authority associated with his public office in a manner that could reasonably be construed to imply that his agency or the Government sanctions or endorses his personal activities or those of another. When teaching, speaking, or writing in a personal capacity, he may refer to his official title or position only as permitted by § 2635.807(b). He may sign a letter of recommendation using his official title only in response to a request for an employment recommendation or character reference based upon personal knowledge of the ability or character of an individual with whom he has dealt in the course of Federal employment or whom he is recommending for Federal employment.

Example 1: An employee of the Department of the Treasury who is asked to provide a letter of recommendation for a former subordinate on his staff may provide the recommendation using official stationery and may sign the letter using his official title. If, however, the request is for the recommendation of a personal friend with whom he has not dealt in the Government, the employee should not use official stationery or sign the letter of recommendation using his official title, unless the recommendation is for Federal employment. In writing the letter of recommendation for his personal friend, it may be appropriate for the employee to refer to his official position in the body of the letter.

(c) *Endorsements.* An employee shall not use or permit the use of his that the performance of his official duties does not give rise to an appearance of use of public office for private gain or of giving preferential treatment, an employee whose duties would affect the financial interests of a friend, relative or person with whom he is affiliated in a nongovernmental capacity shall comply with any applicable requirements of § 2635.502.

(e) *Use of terms of address and ranks.* Nothing in this section prohibits an employee who is ordinarily addressed using a general term of address, such as "The Honorable", or a rank, such as a military or ambassadorial rank, from using that term of address or rank in connection with a personal activity.

§ 2635.703 Use of nonpublic information.

(a) *Prohibition.* An employee shall not engage in a financial transaction using nonpublic information, nor allow the improper use of nonpublic information to further his own private interest or that of another, whether through advice or recommendation, or by knowing unauthorized disclosure.

(b) *Definition of nonpublic information.* For purposes of this section, *nonpublic information* is information that the employee gains by reason of Federal employment and that he knows or reasonably should know has not been made available to the general public. It includes information that he knows or reasonably should know:

(1) Is routinely exempt from disclosure under 5 U.S.C. 552 or otherwise protected from disclosure by statute, Executive order or regulation;

(2) Is designated as confidential by an agency; or

(3) Has not actually been disseminated to the general public and is not authorized to be made available to the public on request.

Example 1: A Navy employee learns in the course of her duties that a small corporation will be awarded a Navy contract for electrical test equipment. She may not take any action to purchase stock in the corporation or its suppliers and she may not advise friends or relatives to do so until after public announcement of the award. Such actions could violate Federal securities statutes as well as this section.

Example 2: A General Services Administration employee involved in evaluating proposals for a construction contract cannot disclose the terms of a competing proposal to a friend employed by a company bidding on the work. Prior to award of the contract, bid or proposal information is nonpublic information specifically protected by 41 U.S.C. 423.

Example 3: An employee is a member of a source selection team assigned to review the proposals submitted by several companies in response to an Army solicitation for spare parts. As a member of the evaluation team, the employee has access to proprietary information regarding the production methods of Alpha Corporation, one of the competitors. He may not use that information to assist Beta Company in drafting a proposal to compete for a Navy spare parts contract. The Federal Acquisition Regulation in 48 CFR parts 3, 14 and 15 restricts the release of information related to procurements and other contractor information that must be protected under 18 U.S.C. 1905 and 41 U.S.C. 423.

Example 4: An employee of the Nuclear Regulatory Commission inadvertently includes a document that is exempt from disclosure with a group of documents released in response to a Freedom of Information Act request. Regardless of whether the document is used improperly, the employee's disclosure does not violate this section because it was not a knowing unauthorized disclosure made for the purpose of furthering a private interest.

Example 5: An employee of the Army Corps of Engineers is actively involved in the activities of an organization whose goals relate to protection of the environment. The employee may not, other than as permitted by agency procedures, give the organization or a newspaper reporter nonpublic information about long-range plans to build a particular dam.

§ 2635.704 Use of Government property.

(a) *Standard.* An employee has a duty to protect and conserve Government property and shall not use such property, or allow its use, for other than authorized purposes.

(b) *Definitions.* For purposes of this section:

(1) *Government property* includes any form of real or personal property in which the Government has an ownership, leasehold, or other property interest as well as any right or other intangible interest that is purchased with Government funds, including the services of contractor personnel. The term includes office supplies, telephone and other telecommunications equipment and services, the Government mails, automated data processing capabilities, printing and reproduction facilities, Government records, and Government vehicles.

(2) *Authorized purposes* are those purposes for which Government property is made available to members of the public or those purposes authorized in accordance with law or regulation.

Example 1: Under regulations of the General Services Administration at 41 CFR 201–21.601, an employee may make a personal long distance call charged to her personal calling card.

Example 2: An employee of the Commodity Futures Trading Commission whose office computer gives him access to a commercial service providing information for investors may not use that service for personal investment research.

Example 3: In accordance with chapter 252 of the Federal Personnel Manual, an attorney employed by the Department of Justice may be permitted to use her office word processor and agency photocopy equipment to prepare a paper to be presented at a conference sponsored by a professional association of which she is a member.

§ 2635.705 Use of official time.

(a) *Use of an employee's own time.* Unless authorized in accordance with law or regulations to use such time for other purposes, an employee shall use official time in an honest effort to perform official duties. An employee not under a leave system, including a Presidential appointee exempted under 5 U.S.C. 6301(2), has an obligation to expend an honest effort and a reasonable proportion of his time in the performance of official duties.

Example 1: An employee of the Social Security Administration may use official time to engage in certain representational activities on behalf of the employee union of which she is a member. Under 5 U.S.C. 7131, this is a proper use of her official time even though it does not involve performance of her assigned duties as a disability claims examiner.

Example 2: A pharmacist employed by the Department of Veterans Affairs has been granted excused absence to participate as a speaker in a conference on drug abuse sponsored by the professional association to which he belongs. Although excused absence granted by an agency in accordance with guidance in chapter 630 of the Federal Personnel Manual allows an employee to be absent from his official duties without charge to his annual leave account, such absence is not on official time.

(b) *Use of a subordinate's time.* An employee shall not encourage, direct, coerce, or request a subordinate to use official time to perform activities other than those required in the performance of official duties or authorized in accordance with law or regulation.

Example 1: An employee of the Department of Housing and Urban Development may not ask his secretary to type his personal correspondence during duty hours. Further, directing or coercing a subordinate to perform such activities during nonduty hours constitutes an improper use of public office for private gain in violation of § 2635.702(a). Where the arrangement is entirely voluntary and appropriate compensation is paid, the secretary may type the correspondence at home on her own time. Where the compensation is not adequate, however, the arrangement would involve a gift to the superior in violation of the standards in subpart C of this part.

Subpart H—Outside Activities

§ 2635.801 Overview.

(a) This subpart contains provisions relating to outside employment, outside activities and personal financial obligations of employees that are in addition to the principles and standards set forth in other subparts of this part. Several of these provisions apply to uncompensated as well as to compensated outside activities.

(b) An employee who wishes to engage in outside employment or other outside activities must comply with all relevant provisions of this subpart, including, when applicable:

(1) The prohibition on outside employment or any other outside activity that conflicts with the employee's official duties;

(2) Any agency-specific requirement for prior approval of outside employment or activities;

(3) The limitations on receipt of outside earned income by certain Presidential appointees and other noncareer employees;

(4) The limitations on paid and unpaid service as an expert witness;

(5) The limitations on participation in professional organizations;

(6) The limitations on paid and unpaid teaching, speaking, and writing; and

(7) The limitations on fundraising activities.

(c) Outside employment and other outside activities of an employee must also comply with applicable provisions set forth in other subparts of this part and in supplemental agency regulations. These include the principle that an employee shall endeavor to avoid actions creating an appearance of violating any of the ethical standards in this part and the prohibition against use of official position for an employee's private gain or for the private gain of any person with whom he has employment or business relations or is otherwise affiliated in a nongovernmental capacity.

(d) In addition to the provisions of this and other subparts of this part, an employee who wishes to engage in outside employment or other outside activities must comply with applicable statutes and regulations. Relevant provisions of law, many of which are listed in subpart I of this part, may include:

(1) 18 U.S.C. 201(b), which prohibits a public official from seeking, accepting or agreeing to receive or accept anything of value in return for being influenced in the performance of an official act or for being induced to take or omit to take any action in violation of his official duty;

(2) 18 U.S.C. 201(c), which prohibits a public official, otherwise than as provided by law for the proper discharge of official duty, from seeking, accepting, or agreeing to receive or accept anything of value for or because of any official act;

(3) 18 U.S.C. 203(a), which prohibits an employee from seeking, accepting, or agreeing to receive or accept compensation for any representational services, rendered personally or by another, in relation to any particular matter in which the United States is a party or has a direct and substantial interest, before any department, agency, or other specified entity. This statute contains several exceptions, as well as standards for special Government employees that limit the scope of the restriction;

(4) 18 U.S.C. 205, which prohibits an employee, whether or not for compensation, from acting as agent or attorney for anyone in a claim against the United States or from acting as agent or attorney for anyone, before any department, agency, or other specified entity, in any particular matter in which the United States is a party or has a direct and substantial interest. It also prohibits receipt of any gratuity, or any share of or interest in a claim against the United States, in consideration for assisting in the prosecution of such claim. This statute contains several exceptions, as well as standards for

special Government employees that limit the scope of the restrictions;

(5) 18 U.S.C. 209, which prohibits an employee, other than a special Government employee, from receiving any salary or any contribution to or supplementation of salary from any source other than the United States as compensation for services as a Government employee. The statute contains several exceptions that limit its applicability;

(6) The Emoluments Clause of the United States Constitution, article I, section 9, clause 8, which prohibits anyone holding an office of profit or trust under the United States from accepting any gift, office, title or emolument, including salary or compensation, from any foreign government except as authorized by Congress. In addition, 18 U.S.C. 219 generally prohibits any public official from being or acting as an agent of a foreign principal, including a foreign government, corporation or person, if the employee would be required to register as a foreign agent under 22 U.S.C. 611 *et seq;*

(7) The Hatch Act, 5 U.S.C. 7321 through 7328, which prohibits most employees from engaging in certain partisan political activities and prohibits all employees from interfering with elections and conducting political activities in the Federal workplace;

(8) The honorarium prohibition, 5 U.S.C. App. (Ethics in Government Act of 1978), which prohibits an employee, other than a special Government employee, from receiving any compensation for an appearance, speech or article. Implementing regulations are contained in §§ 2636.201 through 2636.205 of this chapter; and

(9) The limitations on outside employment, 5 U.S.C. App. (Ethics in Government Act of 1978), which prohibit a covered noncareer employee's receipt of compensation for specified activities and provide that he shall not allow his name to be used by any firm or other entity which provides professional services involving a fiduciary relationship. Implementing regulations are contained in §§ 2636.305 through 2636.307 of this chapter.

§ 2635.802 Conflicting outside employment and activities.

An employee shall not engage in outside employment or any other outside activity that conflicts with his official duties. An activity conflicts with an employee's official duties:

(a) If it is prohibited by statute or by an agency supplemental regulation; or

(b) If, under the standards set forth in §§ 2635.402 and 2635.502, it would require the employee's disqualification from matters so central or critical to the performance of his official duties that the employee's ability to perform the duties of his position would be materially impaired.

Employees are cautioned that even though an outside activity may not be prohibited under this section, it may violate other principles or standards set forth in this part or require the employee to disqualify himself from participation in certain particular matters under either subpart D or subpart E of this part.

Example 1: An employee of the Environmental Protection Agency has just been promoted. His principal duty in his new position is to write regulations relating to the disposal of hazardous waste. The employee may not continue to serve as president of a nonprofit environmental organization that routinely submits comments on such regulations. His service as an officer would require his disqualification from duties critical to the performance of his official duties on a basis so frequent as to materially impair his ability to perform the duties of his position.

Example 2: An employee of the Occupational Safety and Health Administration who was and is expected again to be instrumental in formulating new OSHA safety standards applicable to manufacturers that use chemical solvents has been offered a consulting contract to provide advice to an affected company in restructuring its manufacturing operations to comply with the OSHA standards. The employee should not enter into the consulting arrangement even though he is not currently working on OSHA standards affecting this industry and his consulting contract can be expected to be completed before he again works on such standards. Even though the consulting arrangement would not be a conflicting activity within the meaning of § 2635.802, it would create an appearance that the employee had used his official position to obtain the compensated outside business opportunity and it would create the further appearance of using his public office for the private gain of the manufacturer.

§ 2635.803 Prior approval for outside employment and activities.

When required by agency supplemental regulation, an employee shall obtain prior approval before engaging in outside employment or activities. Where it is determined to be necessary or desirable for the purpose of administering its ethics program, an agency shall, by supplemental regulation, require employees or any category of employees to obtain prior approval before engaging in specific types of outside activities, including outside employment.

Note: Any requirement for prior approval of employment or activities contained in any agency regulation, instruction, or other issuance in effect prior to the effective date of this part shall constitute a requirement for prior approval for purposes of this section for one year after the effective date of this part or until issuance of an agency supplemental regulation, whichever occurs first.

§ 2635.804 Outside earned income limitations applicable to certain Presidential appointees and other noncareer employees.

(a) *Presidential appointees to full-time noncareer positions.* A Presidential appointee to a full-time noncareer position shall not receive any outside earned income for outside employment, or for any other outside activity, performed during that Presidential appointment. This limitation does not apply to any outside earned income received for outside employment, or for any other outside activity, carried out in satisfaction of the employee's obligation under a contract entered into prior to April 12, 1989.

(b) *Covered noncareer employees.* Covered noncareer employees, as defined in § 2636.303(a) of this chapter, may not, in any calendar year, receive outside earned income attributable to that calendar year which exceeds 15 percent of the annual rate of basic pay for level II of the Executive Schedule under 5 U.S.C. 5313, as in effect on January 1 of such calendar year. Employees should consult the regulations implementing this limitation, which are contained in §§ 2636.301 through 2636.304 of this chapter.

Note: In addition to the 15 percent limitation on outside earned income, covered noncareer employees are prohibited from receiving any compensation for: practicing a profession which involves a fiduciary relationship; affiliating with or being employed by a firm or other entity which provides professional services involving a fiduciary relationship; serving as an officer or member of the board of any association, corporation or other entity; or teaching without prior approval. Implementing regulations are contained in §§ 2636.305 through 2636.307 of this chapter.

(c) *Definitions.* For purposes of this section:

(1) *Outside earned income* has the meaning set forth in § 2636.303(b) of this chapter, except that § 2636.303(b)(8) shall not apply.

(2) *Presidential appointee to a full-time noncareer position* means any employee who is appointed by the President to a full-time position described in 5 U.S.C. 5312 through 5317 or to a position that, by statute or as a matter of practice, is filled by Presidential appointment, other than:

(i) A position filled under the authority of 3 U.S.C. 105 or 3 U.S.C. 107(a) for which the rate of basic pay is less than that for GS–9, step 1 of the General Schedule;

(ii) A position, within a White House operating unit, that is designated as not normally subject to change as a result of a Presidential transition;

(iii) A position within the uniformed services; or

(iv) A position in which a member of the foreign service is serving that does not require advice and consent of the Senate.

Example 1: A career Department of Justice employee who is detailed to a policy-making position in the White House Office that is ordinarily filled by a noncareer employee is not a Presidential appointee to a full-time noncareer position.

Example 2: A Department of Energy employee appointed under § 213.3301 of this title to a Schedule C position is appointed by the agency and, thus, is not a Presidential appointee to a full-time noncareer position.

§ 2635.805 Service as an expert witness.

(a) *Restriction.* An employee shall not serve, other than on behalf of the United States, as an expert witness, with or without compensation, in any proceeding before a court or agency of the United States in which the United States is a party or has a direct and substantial interest, unless the employee's participation is authorized by the agency under paragraph (c) of this section. Except as provided in paragraph (b) of this section, this restriction shall apply to a special Government employee only if he has participated as an employee or special Government employee in the particular proceeding or in the particular matter that is the subject of the proceeding.

(b) *Additional restriction applicable to certain special Government employees.* (1) In addition to the restriction described in paragraph (a) of this section, a special Government employee described in paragraph (b)(2) of this section shall not serve, other than on behalf of the United States, as an expert witness, with or without compensation, in any proceeding before a court or agency of the United States in which his employing agency is a party or has a direct and substantial interest, unless the employee's participation is authorized by the agency under paragraph (c) of this section.

(2) The restriction in paragraph (b)(1) of this section shall apply to a special Government employee who:

(i) Is appointed by the President;

(ii) Serves on a commission established by statute; or

(iii) Has served or is expected to serve for more than 60 days in a period of 365 consecutive days.

(c) *Authorization to serve as an expert witness.* Provided that the employee's testimony will not result in compensation for an appearance in violation of § 2636.201 of this chapter or violate any of the principles or standards set forth in this part, authorization to provide expert witness service otherwise prohibited by paragraphs (a) and (b) of this section may be given by the designated agency ethics official of the agency in which the employee serves when:

(1) After consultation with the agency representing the Government in the proceeding or, if the Government is not a party, with the Department of Justice and the agency with the most direct and substantial interest in the matter, the designated agency ethics official determines that the employee's service as an expert witness is in the interest of the Government; or

(2) The designated agency ethics official determines that the subject matter of the testimony does not relate to the employee's official duties within the meaning of § 2635.807(a)(2)(i).

(d) Nothing in this section prohibits an employee from serving as a fact witness when subpoenaed by an appropriate authority.

§ 2635.806 Participation in professional associations. [Reserved]

§ 2635.807 Teaching, speaking and writing.

(a) *Compensation for teaching, speaking or writing.* Except as permitted was extended to the employee primarily because of his official position rather than his expertise on the particular subject matter;

(C) The invitation to engage in the activity or the offer of compensation for the activity was extended to the employee, directly or indirectly, by a person who has interests that may be affected substantially by performance or nonperformance of the employee's official duties;

(D) The information conveyed through the activity draws substantially on ideas or official data that are nonpublic information as defined in § 2635.703(b); or

(E) Except as provided in paragraph (a)(2)(i)(E)(*4*) of this section, the subject of the activity deals in significant part with:

(*1*) Any matter to which the employee presently is assigned or to which the employee had been assigned during the previous one-year period;

(*2*) Any ongoing or announced policy, program or operation of the agency; or

(*3*) In the case of a noncareer employee as defined in § 2636.303(a) of this chapter, the general subject matter area, industry, or economic sector primarily affected by the programs and operations of his agency.

(*4*) The restrictions in paragraphs (a)(2)(i)(E) (*2*) and (*3*) of this section do not apply to a special Government employee. The restriction in paragraph (a)(2)(i)(E)(*1*) of this section applies only during the current appointment of a special Government employee; except that if the special Government employee has not served or is not expected to serve for more than 60 days during the first year or any subsequent one year period of that appointment, the restriction applies only to particular matters involving specific parties in which the special Government employee has participated or is participating personally and substantially.

by paragraph (a)(3) of the section, an employee, including a special Government employee, shall not receive compensation from any source other than the Government for teaching, speaking or writing that relates to the employee's official duties.

(1) *Relationship to other limitations on receipt of compensation.* The compensation prohibition contained in this section is in addition to any other limitation on receipt of compensation set forth in this chapter, including:

(i) The honorarium prohibition on receipt of compensation for an appearance, speech or article, which is implemented in §§ 2636.201 through 2636.205 of this chapter;

(ii) The requirement contained in § 2636.307 of this chapter that covered noncareer employees obtain advance authorization before engaging in teaching for compensation; and

(iii) The prohibitions and limitations in § 2635.804 and in § 2636.304 of this chapter on receipt of outside earned income applicable to certain Presidential appointees and to other covered noncareer employees.

Example 1. A personnel specialist employed by the Department of Labor has been asked by the publisher of a magazine to write an article on his hobby of collecting arrowheads. Even though the subject matter is unrelated to his official duties, he may not accept the publisher's offer of $200 for the article. Because the compensation offered is for an article, its receipt would violate the honorarium prohibition contained in §§ 2636.201 through 2636.205 of this chapter.

(2) *Definitions.* For purposes of this paragraph:

(i) Teaching, speaking or writing relates to the employee's official duties if:

(A) The activity is undertaken as part of the employee's official duties;

(B) The circumstances indicate that the invitation to engage in the activity

Note: Section 2635.807(a)(2)(i)(E) does not preclude an employee, other than a covered noncareer employee, from receiving compensation for teaching, speaking or writing on a subject within the employee's discipline or inherent area of expertise based on his educational background or experience even though the teaching, speaking or writing deals generally with a subject within the agency's areas of responsibility.

Example 1: The Director of the Division of Enforcement at the Commodity Futures Trading Commission has a keen interest in stamp collecting and has spent years developing his own collection as well as studying the field generally. He is asked by an international society of philatelists to give a series of four lectures on how to assess the value of American stamps. Because the subject does not relate to his official duties, the Director may accept compensation for the lecture series. He could not, however, accept a similar invitation from a commodities broker.

Example 2: A scientist at the National Institutes of Health, whose principal area of Government research is the molecular basis of the development of cancer, could not be compensated for writing a book which focuses specifically on the research she conducts in her position at NIH, and thus, relates to her official duties. However, the scientist could receive compensation for writing or editing a textbook on the treatment of all cancers, provided that the book does not focus on recent research at NIH, but rather conveys scientific knowledge gleaned from the scientific community as a whole. The book might include a chapter, among many other chapters, which discusses the molecular basis of cancer development. Additionally, the book could contain brief discussions of recent developments in cancer treatment, even though some of those developments are derived from NIH research, as long as it is available to the public.

Example 3: On his own time, a National Highway Traffic Safety Administration employee prepared a consumer's guide to purchasing a safe automobile that focuses on automobile crash worthiness statistics gathered and made public by NHTSA. He may not receive royalties or any other form of compensation for the guide. The guide deals in significant part with the programs or operations of NHTSA and, therefore, relates to the employee's official duties. On the other hand, the employee could receive royalties from the sale of a consumer's guide to values in used automobiles even though it contains a brief, incidental discussion of automobile safety standards developed by NHTSA.

Example 4: An employee of the Securities and Exchange Commission may not receive compensation for a book which focuses specifically on the regulation of the securities industry in the United States, since that subject concerns the regulatory programs or operations of the SEC. The employee may, however, write a book about the advantages of investing in various types of securities as long as the book contains only an incidental discussion of any program or operation of the SEC.

Example 5: An employee of the Department of Commerce who works in the Department's employee relations office is an acknowledged expert in the field of Federal employee labor relations, and participates in Department negotiations with employee unions. The employee may receive compensation from a private training institute for a series of lectures which describe the decisions of the Federal Labor Relations Authority concerning unfair labor practices, provided that her lectures do not contain any significant discussion of labor relations cases handled at the Department of Commerce, or the Department's labor relations policies. Federal Labor Relations Authority decisions concerning Federal employee unfair labor practices are not a specific program or operation of the Department of Commerce and thus do not relate to the employee's official duties. However, an employee of the FLRA could not give the same presentations for compensation.

Example 6: A program analyst employed at the Environmental Protection Agency may receive royalties and other compensation for a book about the history of the environmental movement in the United States even though it contains brief references to the creation and responsibilities of the EPA. A covered noncareer employee of the EPA, however, could not receive compensation for writing the same book because it deals with the general subject matter area affected by EPA programs and operations. Neither employee could receive compensation for writing a book that focuses on specific EPA regulations or otherwise on its programs and operations.

Example 7: An attorney in private practice has been given a one year appointment as a special Government employee to serve on an advisory committee convened for the purpose of surveying and recommending modification of procurement regulations that deter small businesses from competing for Government contracts. Because his service under that appointment is not expected to exceed 60 days, the attorney may accept compensation for an article about the anticompetitive effects of certain regulatory certification requirements even though those regulations are being reviewed by the advisory committee. The regulations which are the focus of the advisory committee deliberations are not a particular matter involving specific parties. Because the information is nonpublic, he could not, however, accept compensation for an article which recounts advisory committee deliberations that took place in a meeting closed to the public in order to discuss proprietary information provided by a small business.

Example 8: A biologist who is an expert in marine life is employed for more than 60 days in a year as a special Government employee by the National Science Foundation to assist in developing a program of grants by the Foundation for the study of coral reefs. The biologist may continue to receive compensation for speaking, teaching and writing about marine life generally and coral reefs specifically. However, during the term of her appointment as a special Government employee, she may not receive compensation for an article about the NSF program she is participating in developing. Only the latter would concern a matter to which the special Government employee is assigned.

Example 9: An expert on international banking transactions has been given a one-year appointment as a special Government employee to assist in analyzing evidence in the Government's fraud prosecution of owners of a failed savings and loan association. It is anticipated that she will serve fewer than 60 days under that appointment. Nevertheless, during her appointment, the expert may not accept compensation for an article about the fraud prosecution, even though the article does not reveal nonpublic information. The prosecution is a particular matter that involves specific parties.

(ii) *Agency* has the meaning set forth in § 2635.102(a), except that any component of a department designated as a separate agency under § 2635.203(a) shall be considered a separate agency.

(iii) *Compensation* includes any form of consideration, remuneration or income, including royalties, given for or in connection with the employee's teaching, speaking or writing activities. Unless accepted under specific statutory authority, such as 31 U.S.C. 1353, 5 U.S.C. 4111 or 7342, or an agency gift acceptance statute, it includes transportation, lodgings and meals, whether provided in kind, by purchase of a ticket, by payment in advance or by reimbursement after the expense has been incurred. It does not include:

(A) Items offered by any source that could be accepted from a prohibited source under subpart B of this part;

(B) Meals or other incidents of attendance such as waiver of attendance fees or course materials furnished as part of the event at which the teaching or speaking takes place; or

(C) Copies of books or of publications containing articles, reprints of articles, tapes of speeches, and similar items that provide a record of the teaching, speaking or writing activity.

(iv) *Receive* means that there is actual or constructive receipt of the compensation by the employee so that the employee has the right to exercise dominion and control over the compensation and to direct its subsequent use. Compensation received by an employee includes compensation which is:

(A) Paid to another person, including a charitable organization, on the basis of designation, recommendation or other specification by the employee; or

(B) Paid with the employee's knowledge and acquiescence to his parent, sibling, spouse, child, or dependent relative.

(v) *Particular matter involving specific parties* has the meaning set forth in § 2637.102(a)(7) of this chapter.

(vi) *Personal and substantial participation* has the meaning set forth in § 2635.402(b)(4).

(3) *Exception for teaching certain courses.* Notwithstanding that the activity would relate to his official duties under paragraphs (a)(2)(i) (B) or (E) of this section, an employee may accept compensation for teaching a course requiring multiple presentations by the employee if the course is offered as part of:

(i) The regularly established curriculum of:

(A) An institution of higher education as defined at 20 U.S.C. 1141(a);

(B) An elementary school as defined at 20 U.S.C. 2891(8); or

(C) A secondary school as defined at 20 U.S.C. 2891(21); or

(ii) A program of education or training sponsored and funded by the Federal Government or by a State or local government which is not offered by an entity described in paragraph (a)(3)(i) of this section.

Example 1: An employee of the Cost Accounting Standards Board who teaches an advanced accounting course as part of the regular business school curriculum of an accredited university may receive compensation for teaching the course even though a substantial portion of the course deals with cost accounting principles applicable to contracts with the Government. Moreover, his receipt of a salary or other compensation for teaching this course does not violate the honorarium prohibition on receipt of compensation for any speech, which is implemented in §§ 2636.201 through 2636.205 of this chapter.

Example 2: An attorney employed by the Equal Employment Opportunity Commission may accept compensation for teaching a course at a state college on the subject of Federal employment discrimination law. The attorney could not accept compensation for teaching the same seminar as part of a continuing education program sponsored by her bar association because the subject of the course is focused on the operations or programs of the EEOC and the sponsor of the course is not an accredited educational institution.

Example 3: An employee of the National Endowment for the Humanities is invited by a private university to teach a course that is a survey of Government policies in support of artists, poets and writers. As part of his official duties, the employee administers a grant that the university has received from the NEH. The employee may not accept compensation for teaching the course because the university has interests that may be substantially affected by the performance or nonperformance of the employee's duties. Likewise, an employee may not receive compensation for any teaching that is undertaken as part of his official duties or that involves the use of nonpublic information.

(b) *Reference to official position.* An employee who is engaged in teaching, speaking or writing as outside employment or as an outside activity shall not use or permit the use of his official title or position to identify him in connection with his teaching, speaking or writing activity or to promote any book, seminar, course, program or similar undertaking, except that:

(1) An employee may include or permit the inclusion of his title or position as one of several biographical details when such information is given to identify him in connection with his teaching, speaking or writing, provided that his title or position is given no more prominence than other significant biographical details;

(2) An employee may use, or permit the use of, his title or position in connection with an article published in a scientific or professional journal, provided that the title or position is accompanied by a reasonably prominent disclaimer satisfactory to the agency stating that the views expressed in the article do not necessarily represent the views of the agency or the United States; and

(3) An employee who is ordinarily addressed using a general term of address, such as "The Honorable," or a rank, such as a military or ambassadorial rank, may use or permit the use of that term of address or rank in connection with his teaching, speaking or writing.

Note: Some agencies may have policies requiring advance agency review, clearance, or approval of certain speeches, books, articles or similar products to determine whether the product contains an appropriate disclaimer, discloses nonpublic information, or otherwise complies with this section.

Example 1: A meteorologist employed with the National Oceanic and Atmospheric Administration is asked by a local university to teach a graduate course on hurricanes. The university may include the meteorologist's Government title and position together with other information about his education and previous employment in course materials setting forth biographical data on all teachers involved in the graduate program. However, his title or position may not be used to promote the course, for example, by featuring the meteorologist's Government title, Senior Meteorologist, NOAA, in bold type under his name. In contrast, his title may be used in this manner when the meteorologist is authorized by NOAA to speak in his official capacity.

Example 2: A doctor just employed by the Centers for Disease Control has written a paper based on his earlier independent research into cell structures. Incident to the paper's publication in the Journal of the American Medical Association, the doctor may be given credit for the paper, as Dr. M. Wellbeing, Associate Director, Centers for Disease Control, provided that the article also contains a disclaimer, concurred in by the CDC, indicating that the paper is the result of the doctor's independent research and does not represent the findings of the CDC.

Example 3: An employee of the Federal Deposit Insurance Corporation has been asked to give a speech in his private capacity, without compensation, to the annual meeting of a committee of the American Bankers Association on the need for banking reform. The employee may be described in his introduction at the meeting as an employee of the Federal Deposit Insurance Corporation provided that other pertinent biographical details are mentioned as well.

§ 2635.808 Fundraising activities.

An employee may engage in fundraising only in accordance with the restrictions in part 950 of this title on the conduct of charitable fundraising in the Federal workplace and in accordance with paragraphs (b) and (c) of this section.

(a) *Definitions.* For purposes of this section: (1) *Fundraising* means the raising of funds for a nonprofit organization, other than a political organization as defined in 26 U.S.C. 527(e), through:

(i) Solicitation of funds or sale of items; or

(ii) Participation in the conduct of an event by an employee where any portion of the cost of attendance or participation may be taken as a charitable tax deduction by a person incurring that cost.

(2) *Participation in the conduct of an event* means active and visible participation in the promotion, production, or presentation of the event and includes serving as honorary chairperson, sitting at a head table during the event, and standing in a reception line. The term does not include mere attendance at an event provided that, to the employee's knowledge, his attendance is not used by the nonprofit organization to promote the event. While the term generally includes any public speaking during the event, it does not include the delivery of an official speech as defined in paragraph (a)(3) of this section or any seating or other participation appropriate to the delivery of such a speech. Waiver of a fee for attendance at an event by a participant in the conduct of that event does not constitute a gift for purposes of subpart B of this part.

Note: This section does not prohibit fundraising for political parties. However, there are statutory restrictions that apply to political fundraising. Employees, other than those exempt under 5 U.S.C. 7324(d), are prohibited by the Hatch Act, 5 U.S.C. 7321 through 7328, from soliciting or collecting contributions or other funds for a partisan political purpose or in connection with a partisan election. In addition, all employees are prohibited by 18 U.S.C. 602 from knowingly soliciting contributions for any political purpose from other employees and by 18 U.S.C. 607 from soliciting such contributions in the Federal workplace.

Example 1: The Secretary of Transportation has been asked to serve as master of ceremonies for an All-Star Gala. Tickets to the event cost $150 and are tax deductible as a charitable donation, with proceeds to be donated to a local hospital. By serving as master of ceremonies, the Secretary would be participating in fundraising.

(3) *Official speech* means a speech given by an employee in his official capacity on a subject matter that relates to his official duties, provided that the employee's agency has determined that the event at which the speech is to be given provides an appropriate forum for the dissemination of the information to be presented and provided that the employee does not request donations or other support for the nonprofit organization. Subject matter relates to an employee's official duties if it focuses specifically on the employee's official duties, on the responsibilities, programs, or operations of the employee's agency as described in § 2635.807(a)(2)(i)(E), or on matters of Administration policy on which the employee has been authorized to speak.

Example 1: The Secretary of Labor is invited to speak at a banquet honoring a distinguished labor leader, the proceeds of which will benefit a nonprofit organization that assists homeless families. She devotes a major portion of her speech to the Administration's Points of Light initiative, an effort to encourage citizens to volunteer their time to help solve serious social problems. Because she is authorized to speak on Administration policy, her remarks at the banquet are an official speech. However, the Secretary would be engaged in fundraising if she were to conclude her official speech with a request for donations to the nonprofit organization..

Example 2: A charitable organization is sponsoring a two-day tennis tournament at a country club in the Washington, DC area to raise funds for recreational programs for learning disabled children. The organization has invited the Secretary of Education to give a speech on federally funded special education programs at the awards dinner to be held at the conclusion of the tournament and a determination has been made that the dinner is an appropriate forum for the particular speech. The Secretary may speak at the dinner and, under § 2635.204(g)(1), he may partake of the meal provided to him at the dinner.

(4) *Personally solicit* means to request or otherwise encourage donations or other support either through person-to-person contact or through the use of one's name or identity in correspondence or by permitting its use by others. It does not include the solicitation of funds through the media or through either oral remarks, or the contemporaneous dispatch of like items of mass-produced correspondence, if such remarks or correspondence are addressed to a group consisting of many persons, unless it is known to the employee that the solicitation is targeted at subordinates or at persons who are prohibited sources within the meaning of § 2635.203(d). It does not include behind-the-scenes assistance in the solicitation of funds, such as drafting correspondence, stuffing envelopes, or accounting for contributions.

Example 1: An employee of the Department of Energy who signs a letter soliciting funds for a local private school does not "personally solicit" funds when 500 copies of the letter, which makes no mention of his DOE position and title, are mailed to members of the local community, even though some individuals who are employed by Department of Energy contractors may receive the letter.

(b) *Fundraising in an official capacity.* An employee may participate in fundraising in an official capacity if, in accordance with a statute, Executive order, regulation or otherwise as determined by the agency, he is authorized to engage in the fundraising activity as part of his official duties. When authorized to participate in an official capacity, an employee may use his official title, position and authority.

Example 1: Because participation in his official capacity is authorized under part 950 of this title, the Secretary of the Army may sign a memorandum to all Army personnel encouraging them to donate to the Combined Federal Campaign.

(c) *Fundraising in a personal capacity.* An employee may engage in fundraising in his personal capacity provided that he does not:

(1) Personally solicit funds or other support from a subordinate or from any person:

(i) Known to the employee, if the employee is other than a special Government employee, to be a prohibited source within the meaning of § 2635.203(d); or

(ii) Known to the employee, if the employee is a special Government employee, to be a prohibited source within the meaning of § 2635.203(d)(4) that is a person whose interests may be substantially affected by performance or nonperformance of his official duties.

(2) Use or permit the use of his official title, position or any authority associated with his public office to further the fundraising effort, except that an employee who is ordinarily addressed using a general term of address, such "The Honorable," or a rank, such as a military or ambassadorial rank, may use or permit the use of that term of address or rank for such purposes; or

(3) Engage in any action that would otherwise violate this part.

Example 1: A nonprofit organization is sponsoring a golf tournament to raise funds for underprivileged children. The Secretary of the Navy may not enter the tournament with the understanding that the organization intends to attract participants by offering other entrants the opportunity, in exchange for a donation in the form of an entry fee, to spend the day playing 18 holes of golf in a foursome with the Secretary of the Navy.

Example 2: An employee of the Merit Systems Protection Board may not use the agency's photocopier to reproduce fundraising literature for her son's private school. Such use of the photocopier would violate the standards at § 2635.704 regarding use of Government property.

Example 3: An Assistant Attorney General may not sign a letter soliciting funds for a homeless shelter as "John Doe, Assistant Attorney General." He also may not sign a letter with just his signature, "John Doe," soliciting funds from a prohibited source, unless the letter is one of many identical, mass-produced letters addressed to a large group where the solicitation is not known to him to be targeted at persons who are either prohibited sources or subordinates.

§ 2635.809 Just financial obligations.

Employees shall satisfy in good faith their obligations as citizens, including all just financial obligations, especially those such as Federal, State, or local taxes that are imposed by law. For purposes of this section, a just financial obligation includes any financial obligation acknowledged by the employee or reduced to judgment by a court. In good faith means an honest intention to fulfill any just financial obligation in a timely manner. In the event of a dispute between an employee and an alleged creditor, this section does not require an agency to determine the validity or amount of the disputed debt or to collect a debt on the alleged creditor's behalf.

Subpart I—Related Statutory Authorities

§ 2635.901 General.

In addition to the standards of ethical conduct set forth in subparts A through H of this part, there are a number of statutes that establish standards to which an employee's conduct must conform. The list set forth in § 2635.902 references some of the more significant of those statutes. It is not comprehensive and includes only references to statutes of general applicability. While it includes references to several of the basic conflict of interest statutes whose standards are explained in more detail throughout this part, it does not include references to statutes of more limited applicability, such as statutes that apply only to officers and employees of the Department of Defense.

§ 2635.902 Related statutes.

(a) The prohibition against solicitation or receipt of bribes (18 U.S.C. 201(b)).

(b) The prohibition against solicitation or receipt of illegal gratuities (18 U.S.C. 201(c)).

(c) The prohibition against seeking or receiving compensation for certain representational services before the Government (18 U.S.C. 203).

(d) The prohibition against assisting in the prosecution of claims against the Government or acting as agent or attorney before the Government (18 U.S.C. 205).

(e) The post-employment restrictions applicable to former employees (18 U.S.C. 207, with implementing regulations at parts 2637 and 2641 of this chapter).

(f) The post-employment restrictions applicable to former procurement officials (41 U.S.C. 423(f)).

(g) The prohibition against participating in matters affecting an employee's own financial interests or the financial interests of other specified persons or organizations (18 U.S.C. 208).

(h) The prohibition on a procurement official's negotiating for employment with competing contractors (41 U.S.C. 423(b)(1)).

(i) The prohibition against receiving salary or any contribution to or supplementation of salary as compensation for Government service from a source other than the United States (18 U.S.C. 209).

(j) The prohibition against gifts to superiors (5 U.S.C. 7351).

(k) The prohibition against solicitation or receipt of gifts from specified prohibited sources (5 U.S.C. 7353).

(l) The prohibition against solicitation or receipt of gifts from competing contractors (41 U.S.C. 423(b)(2)).

(m) The provisions governing receipt and disposition of foreign gifts and decorations (5 U.S.C. 7342).

(n) The Code of Ethics for Government Service (Pub. L. 96–303, 94 Stat. 855).

(o) The prohibitions against certain political activities (5 U.S.C. 7321 *et seq.* and 18 U.S.C. 602, 603, 606 and 607).

(p) The prohibitions against disloyalty and striking (5 U.S.C. 7311 and 18 U.S.C. 1918).

(q) The general prohibition against acting as the agent of a foreign principal required to register under the Foreign Agents Registration Act (18 U.S.C. 219).

(r) The prohibition against employment of a person convicted of participating in or promoting a riot or civil disorder (5 U.S.C. 7313).

(s) The prohibition against employment of an individual who habitually uses intoxicating beverages to excess (5 U.S.C. 7352).

(t) The prohibition against misuse of a Government vehicle (31 U.S.C. 1344).

(u) The prohibition against misuse of the franking privilege (18 U.S.C. 1719).

(v) The prohibition against fraud or false statements in a Government matter (18 U.S.C. 1001).

(w) The prohibition against concealing, mutilating or destroying a public record (18 U.S.C. 2071).

(x) The prohibition against counterfeiting or forging transportation requests (18 U.S.C. 508).

(y) The restrictions on disclosure of certain sensitive Government information under the Freedom of Information Act and the Privacy Act (5 U.S.C. 552 and 552a).

(z) The prohibitions against disclosure of classified information (18 U.S.C. 798 and 50 U.S.C. 783(b)).

(aa) The prohibition against disclosure of proprietary information and certain other information of a confidential nature (18 U.S.C. 1905).

(bb) The prohibition against unauthorized disclosure of certain procurement sensitive information, including proprietary or source selection information (41 U.S.C. 423(b) (3) and (d)).

(cc) The prohibition against unauthorized use of documents relating to claims from or by the Government (18 U.S.C. 285).

(dd) The prohibition against certain personnel practices (5 U.S.C. 2302).

(ee) The prohibition against interference with civil service examinations (18 U.S.C. 1917).

(ff) The restrictions on use of public funds for lobbying (18 U.S.C. 1913).

(gg) The prohibition against participation in the appointment or promotion of relatives (5 U.S.C. 3110).

(hh) The prohibition against solicitation or acceptance of anything of value to obtain public office for another (18 U.S.C. 211).

(ii) The prohibition against conspiracy to commit an offense against or to defraud the United States (18 U.S.C. 371).

(jj) The prohibition against embezzlement or conversion of Government money or property (18 U.S.C. 641).

(kk) The prohibition against failing to account for public money (18 U.S.C. 643).

(ll) The prohibition against embezzlement of the money or property of another person that is in the possession of an employee by reason of his employment (18 U.S.C. 654).

[FR Doc. 92–16070 Filed 8–6–92; 8:45 am]

BILLING CODE 6345–01–M

Federal Advisory Committee Act

Citations:

5 U.S.C. App. (1988), enacted October 6, 1972, by Pub. L. No. 92-463, 86 Stat. 770.

Lead Agency:

General Services Administration, Office of Administration, Committee Management Secretariat, Suite 815A, 1730 K Street NW, Washington, DC 20006 (202) 632-1126.

Overview:

The Federal Advisory Committee Act (FACA) regulates the formation and operation of advisory committees by federal agencies in the Executive Branch. "Advisory committee" is defined in section 3 to include any committee or similar group (1) established by statute or organization plan, (2) established or utilized in the interest of obtaining advice or recommendations for the President or one or more federal agencies, and (3) not composed wholly of full-time federal officers or employees. Among the requirements of the Act are that new advisory committees be established only after public notice and upon a determination that establishment is in the public interest (§9(a)); that each advisory committee have a clearly defined purpose and that its membership be fairly balanced in terms of the points of view represented and the functions to be performed (§5); that the status of and need for each committee be subject to periodic review (§§7, 14); and that meetings of advisory committees be open to public observation, subject to the same exemptions as in the Government in the Sunshine Act (§10). (See Chapter 9.)

At the end of fiscal year 1990 (September 30, 1990), there were 1,071 federal advisory committees, composed of 22,391 persons.

The principal functions of guiding and coordinating the administration of the Act, which the Act vested in the President and the Director of the Office of Management and Budget, were transferred to the Administrator of General Services by Executive Order 12,024 of December 1, 1977, reprinted at 5 U.S.C. App. §2 note. GSA has issued regulations for agencies on management of advisory committees (41 CFR §§101-6.1001 to 101-6.1035 (1990)).

The breadth of the definition of "advisory committee" has provoked uncertainty and some litigation.[1] In 1980 the Conference, in its Recommendation 80-3, urged that GSA issue guidelines on the subject, making clear that FACA does not apply to meetings between ad hoc groups and federal officials or committees that are not established by the government or affirmatively supported and "utilized" through arrangements that amount to the adoption of the group as a preferred source of advice. Even more uncertain is the status of the "one-time" meeting of individuals called by an agency official or the President, on short notice and without formal structure, to obtain advice, usually in an emergency situation. Some of the uncertainties may be clarified by regulations.

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[1] See, for example, Nader v. Baroody, 396 F. Supp. 1231 (D. D. C. 1975); Center for Auto Safety v. Cox, 580 F.2d 689 (D.C. Cir. 1978); Lombardo v. Handler, 397 F. Supp. 792 (D. D. C. 1975), aff'd. 546 F.2d 1043 (D.C. Cir. 1976); Food Chemical News, Inc. v. Davis, 378 F. Supp. 1048 (D. D. C. 1974); Public Citizen v. Dept. H.H.S., Civ. Action No. 92-0326 (D.D.C. May 28, 1992) (what constitutes fair balance); Wash. Post et al. v. National Council on the Arts, Civ. Action No. 92-0955 (D.D.C. Apr. 29, 1992) (grounds for closure); Bureau of National Affairs v. President's Council of Advisors on Science and Technology, Civ. Action No. 92-1088 (D.D.C. May 7, 1992) (grounds for closure); and Natural Resources Defense Council v. EPA, Civ. Action No. 92-1378 (RCL) (D.D.C. May 19, 1992) (grounds for closure). In Public Citizen v. U.S. Dep. of Justice, 109 S. Ct. 2558 (1989), the Supreme Court held that FACA did not apply to the "special advisory relationship" between the President and the American Bar Association Standing Committee on Federal Judiciary on matters of judicial nomination. The opinion turned on the court's conclusion that the ABA group was not a "utilized" committee within the meaning intended by Congress and, thus, the ABA committee did not fall under the statutory definition of "advisory committee" under FACA.

Subsequent cases have further refined the definition of what constitutes a "utilized" advisory committee. See, for example, Food Chemical News v. Young, 900 F.2d 328 (D.C. Cir. 1990) and Center for Auto Safety v. Federal Highway Administration, unpub. mem. opin. (Civ. Action No. 89-1045) (D. D. C. Oct 12, 1990).

The statute itself prescribes no conflict-of-interest requirements for advisory committee members. However, chapter 11 of title 18 of the U.S. Code, particularly section 208, is applicable to federal employees generally, including the category of "special government employees." Unless an advisory committee member is appointed as a representative of a particular interest, and is thus not considered a government employee, he or she is likely to be a special government employee, whether or not compensated. Section 208(b)(3) authorizes an official who appoints an advisory committee member to exempt a special government employee where the need for the individual's services outweighs the potential for a conflict of interest. See generally, Memorandum Opinion for the Chief Counsel, Food and Drug Administration, 2 Op. O.L.C. 151 (1978).

Special government employees are subject to disclosure requirements. See 57 Fed. Reg. 11800 (April 7, 1992).

Section 219 of title 18 of the U.S. Code makes it a criminal offense for a public official to be or to act as an agent of a foreign principal required to register under the Foreign Agents Registration Act of 1938. The Department of Justice has concluded that members of federal advisory committees governed by the Federal Advisory Committee Act come within the definition of "public official." Letter of Deputy Assistant Attorney General, Office of Legal Counsel to Deputy Counsel to the President (April 29, 1991). Section 219(b) allows the head of the agency to exempt from section 219(a) those individuals who serve on advisory committees as "special government employees" but not those who serve as representatives. In addition, the Department takes the position that the Emoluments Clause of the U.S. Constitution, Article I, §9, cl. 8, prohibits an individual who is an agency of a foreign government from serving on an advisory committee absent specific Congressional consent. The Department concludes that Congress has not consented to such service.

Legislative History:

Legislation to establish minimum standards for the organization and operation of federal advisory committees was considered intermittently by Congress since the mid-1950s. After oversight hearings in the 91st Congress (1969-70), legislation was introduced in both houses in the 92d Congress, and hearings were held by both the Senate Committee on Governmental Affairs and the House Committee on Government Operations. The House Committee on Government Operations reported out H.R. 4383, the Federal Advisory Committee Standards Act in April 1972 (H.R. Rep. No. 92-1017), which was considered and passed by the House on May 9, 1972. The Senate Committee on Governmental Affairs, having considered three separate bills, reported a clean bill, S. 3529, the Federal Advisory Committee Act, on September 7, 1972 (S. Rep. No. 92-1098). This bill was approved by the Senate on September 12, 1972 and its text substituted for that in the House-passed bill. The relatively minor differences between the two bills were resolved in a Conference Report (H.R. Rep. No. 92-1403), which was adopted by the Senate on September 20, 1972. FACA became effective on January 4, 1973.

In 1976, the Congress applied to advisory committees the grounds for closure of meetings found in the Government in the Sunshine Act (5 U.S.C. §552b, Pub. L. No. 94-409, September 13, 1976).

In the 100th Congress, Senator John Glenn, Chairman of the Senate Committee on Governmental Affairs, along with Senator Carl Levin, introduced S. 2721, the Federal Advisory Committee Amendments Act of 1988. Three hearings were held by the Senate Committee on Governmental Affairs: *Federal Advisory Committee Act and the President's AIDS Commission*, S. Hrg. 100-538 (December 3, 1987); *Department of Defense/Strategic Defense Initiative Organization Compliance With Federal Advisory Committee Act*, S. Hrg. 100-681 (April 19, 1988); and *Federal Advisory Committee Amendments Act of 1988*, S. Hrg. 100-945 (October 5, 1988). The bill was reintroduced in the 101st Congress as the *Federal Advisory Committee Act Amendments of 1989*, S. 444, S. Hrg. 101-38 (March 15, 1989). It was marked up by the Committee on March 29, 1990, but was not sent to the Senate floor for a vote before the session ended. The proposed legislation has been aimed at clarifying and strengthening several aspects of the program. S. 2039, the *Federal Advisory Committee Act Amendments of 1992*, was introduced in the 102d Congress and has been marked up by the Senate Committee on Governmental Affairs.[2]

Source Note:

The relevant legislative history materials are collected in *Federal Advisory Committee Act (Public Law 92-463), Source Book: Legislative History, Texts, and Other Documents* (1978), prepared for the Senate Committee on Governmental Affairs.

Conference Recommendation 80-3 was based on a study by Michael H. Cardozo, *The Federal Advisory Committee Act in Operation*, which summarizes relevant cases up to the date of its publication. *The Utilization and Management of Federal Advisory Committees* (1983), commissioned by the Kettering Foundation, is a valuable study of experience under FACA.

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[2] S. Rep. No. 102-281, 102d Cong. 2d Sess. (1992) would clarify a number of FACA's definitions (such as that of "meeting" and "subcommittee") and would create an exemption from FACA for required meetings of state and local government officials with their federal counterparts. It exempts "utilized" advisory committees from most of FACA's substantive requirements such as balance, public access, and financial disclosure, but contains provisions designed to ensure some accountability for their use. It also provides a new definition of what constitutes a "fair balance" of committee members and imposes new and more stringent reporting requirements for conflicts of interest. It requires the identification of committee members who are appointed as special government employees and as representatives of non-governmental interests and calls for written materials provided to advisory committee members to be made available to the public substantially at the time they are distributed to advisory committee members. The bill also grants, with certain limitations and notice requirements, authority to the President and agency heads to abolish statutorily created advisory committees. If there is a material disagreement between GSA and an agency regarding the establishment, management, or termination of an advisory committee, the bill gives the agency head final authority to make the determination in question. Finally, the bill accords a private right of action in federal district court, with the possible recovery of attorneys' fees, when an advisory committee is alleged not to be in compliance with FACA.

Bibliography:

I. Legislative History

1. See discussion above.

2. Congressional Research Service, *Federal Advisory Committee* Act (Pub. L. No. 92-463), *Source Book: Legislative History, Texts and Other Documents* (July 1978).

3. *Hearings on Bills to Amend the Federal Advisory Committee Act, Pub. L. No. 92-463, 86 Stat. 770 (1972) before Subcommittee on Reports, Accounting, and Management of the Senate Committee on Governmental Affairs, 94th Cong., 2d Sess. (1976).*

4. Senate Committee on Governmental Affairs, *Oversight of the Federal Advisory Committee Act*, S. Hrg. No. 98-1037, 98th Cong., 2d Sess. (June 21, 1984).

5. Senate Committee on Governmental Affairs, *Federal Advisory Committee Act and the President's AIDS Commission*, S. Hrg. 100-538, 100th Cong., 1st Sess. (December 3, 1987).

6. Senate Committee on Governmental Affairs, *Department of Defense/Strategic Defense Initiative Organization Compliance With the Federal Advisory Committee Act*, S. Hrg. 100-681, 100th Cong., 2d Sess. (April 19, 1988).

7. Senate Committee on Governmental Affairs, *Federal Advisory Committee Amendments of 1988*, S. Hrg. 100-945, 100th Cong., 2d Sess. (October 5, 1988).

8. Senate Committee on Governmental Affairs, *Federal Advisory Committee Act Amendments of 1989*, S. Hrg. 101-38, 101st Cong., 1st Sess. (March 15, 1989).

9. Senate Committee on Governmental Affairs, *Federal Advisory Committee Act Amendments of 1992*, S. Rep. No. 102-281, 102d Cong., 2d Sess. (1992).

II. Other Government Documents

1. Administrative Conference of the U.S., Recommendation 80-3, *Interpretation and Implementation of the Federal Advisory Committee Act*, 1 CFR §305.80-3 (1992).

2. Administrative Conference of the U.S., Recommendation 82-4, *Procedures for Negotiating Proposed Regulations*, 1 CFR §305.82-4 (1992).

3. Administrative Conference of the U.S., Recommendation 85-5, *Procedures for Negotiating Proposed Regulations*, 1 CFR §305.85-5 (1992).

4. Administrative Conference of the U.S., Recommendation 89-3, *Conflict-of-Interest Requirements for Federal Advisory Committees*, 1 CFR §305.89-3 (1992).

5. *Annual Report of the President on Federal Advisory Committees* (U.S. Government Printing Office, published annually).

III. Books and Articles

1. M. Cardozo, *The Federal Advisory Committee Act in Operation*, Report to the Administrative Conference of the United States, 1980 ACUS 313, *reprinted in* 33 Admin. L. Rev. 1 (1981).

2. D. Marblestone, *The Coverage of the Federal Advisory Committee Act*, 35 Fed. B. J. 119 (1976).

3. B. Murphy, *Implementation of the Federal Advisory Committee Act: An Overview*, 9 Government Publications Rev. 3 (1982).

4. R. Wegman, *The Utilization and Management of Federal Advisory Committees* (Kettering Foundation, 1983).

Appendix:

1. Federal Advisory Committee Act, 5 U.S.C. App. (1988).
2. General Services Administration, Federal Advisory Committee Management Regulations, 41 CFR §§101-6.1001 to 101-6.1035 (1990).

Federal Advisory Committee Act

Title 5 Appendix, U.S. Code

Pub. L. No. 92-463, Oct. 6, 1972, 86 Stat. 770, as amended by Pub. L. No. 94-409, §5(c), Sept. 13, 1976, 90 Stat. 1247; Pub. L. No. 96-523, §2, Dec. 12, 1980, 94 Stat. 3040; Pub. L. No. 97-375, title II, §201(c), Dec. 21, 1982, 96 Stat. 1822

§1. Short title

This Act may be cited as the "Federal Advisory Committee Act".
(Pub. L. No. 92-463, §1, Oct. 6, 1972, 86 Stat. 770.)

Act Referred to in Other Sections

The Federal Advisory Committee Act is referred to in sections 582, 585 of this title; title 7 sections 450i, 511d, 1725, 2008, 2020, 2026, 2204b, 2286, 3152, 5872, 6518; title 8 section 1356; title 10 section 946; title 12 sections 1441a, 1701q, 2246; title 15 sections 78k-1, 78q, 776, 2080, 4802, 4806; title 16 sections 410nn-3, 410pp-4, 460vv-12, 460ww-5, 463, 470q, 541g, 1533, 1612, 1852, 3602, 3632, 4403; title 18 section 208; title 19 sections 2155, 2605; title 20 sections 80q-10, 1221e-1, 2403, 2466a; title 22 sections 2124b, 2194b, 4833; title 24 section 225b; title 29 section 1302; title 33 section 2251; title 42 sections 282, 290aa, 300v-3, 2210, 2486h, 3788, 5816, 6007, 6374c, 6708, 6838, 7234, 10173b, 10248; title 43 sections 1600b, 1739, 1753; title 44 section 2701; title 45 sections 431, 1116, 1212; title 46 section 4508; title 46 App. section 1295b; title 47 section 332; title 49 App. section 1903; title 50 App. sections 2158, 2158a, 2169.

§2. Findings and purpose

(a) The Congress finds that there are numerous committees, boards, commissions, councils, and similar groups which have been established to advise officers and agencies in the executive branch of the Federal Government and that they are frequently a useful and beneficial means of furnishing expert advice, ideas, and diverse opinions to the Federal Government.

(b) The Congress further finds and declares that--

(1) the need for many existing advisory committees has not been adequately reviewed:

(2) new advisory committees should be established only when they are determined to be essential and their number should be kept to the minimum necessary;

(3) advisory committees should be terminated when they are no longer carrying out the purposes for which they were established;

(4) standards and uniform procedures should govern the establishment, operation, administration, and duration of advisory committees;

(5) the Congress and the public should be kept informed with respect to the number, purpose, membership, activities, and cost of advisory committees; and

(6) the function of advisory committees should be advisory only, and that all matters under their consideration should be determined, in accordance with law, by the official, agency, or officer involved.

(Pub. L. No. 92-463, §2, Oct. 6, 1972, 86 Stat. 770.)

Executive Order No. 11686

Ex. Ord. No. 11686, Oct. 7, 1972, 37 F.R. 21421, which related to committee management, was superseded by Ex. Ord. No. 11769, Feb. 21, 1974, 39 F.R. 7125, formerly set out as a note under this section.

Executive Order No. 11769

Ex. Ord. No. 11769, Feb. 21, 1974, 39 F.R. 7125, which related to committee management, was revoked by Ex. Ord. No. 12024, Dec. 1, 1977, 42 F.R. 61445, set out as a note below.

Ex. Ord. No. 12024. Transfer of Certain Advisory Committee Functions

Ex. Ord. No. 12024, Dec. 1, 1977, 42 F.R. 61445, provided:

By virtue of the authority vested in me by the Constitution and statutes of the United States of America, including the Federal Advisory Committee Act, as amended (5 U.S.C. App.), Section 301 of Title 3 of the United States Code, Section 202 of the Budget and Accounting Procedures Act of 1950 (31 U.S.C. 581c) [31 U.S.C. 1531], and Section 7 of Reorganization Plan No. 1 of 1977 (42 F.R. 56101 (October 21, 1977)) [set out in this Appendix], and as President of the United States of America, in accord with the transfer of advisory committee functions from the Office of Management and Budget to the General Services Administration provided by Reorganization Plan No. 1 of 1977, it is hereby ordered as follows:

Section 1. The transfer, provided by Section 5F of Reorganization Plan No. 1 of 1977 (42 F.R. 56101) [set out in this Appendix], of certain functions under the Federal Advisory Committee Act, as amended (5 U.S.C. App.), from the Office of Management and Budget and its Director to the Administrator of General Services is hereby effective.

Sec. 2. There is hereby delegated to the Administrator of General Services all the functions vested in the President by the Federal Advisory Committee Act, as amended, except that, the annual report to the Congress required by Section 6(c) of that Act shall be prepared by the Administrator for the President's consideration and transmittal to the Congress.

Sec. 3. The Director of the Office of Management and Budget shall take all actions necessary or appropriate to effectuate the transfer of functions provided in this Order, including the transfer of funds, personnel and positions, assets, liabilities, contracts, property, records, and other items related to the functions transferred.

Sec. 4. Executive Order No. 11769 of February 21, 1974 is hereby revoked.

Sec. 5. Any rules, regulations, orders, directives, circulars, or other actions taken pursuant to the functions transferred or reassigned as provided in this Order from the Office of Management and Budget to the Administrator of General

Services, shall remain in effect as if issued by the Administrator until amended, modified, or revoked.

Sec. 6. This Order shall be effective November 20, 1977.

Jimmy Carter.

§3. Definitions

For the purpose of this Act--

(1) The term "Administrator" means the Administrator of General Services.

(2) The term "advisory committee" means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof (hereafter in this paragraph referred to as "committee"), which is

(A) established by statute or reorganization plan, or

(B) established or utilized by the President, or

(C) established or utilized by one or more agencies,

in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government, except that such term excludes (i) the Advisory Commission on Intergovernmental Relations, (ii) the Commission on Government Procurement, and (iii) any committee which is composed wholly of full-time officers or employees of the Federal Government.

(3) The term "agency" has the same meaning as in section 551(1) of title 5, United States Code.

(4) The term "Presidential advisory committee" means an advisory committee which advises the President.

(Pub. L. No. 92-463, §3, Oct. 6, 1972, 86 Stat. 770; 1977 Reorg. Plan No. 1, §5F, eff. Nov. 20, 1977, 42 F.R. 56101, 91 Stat. 1634.)

Transfer of Functions

"Administrator means the Administrator of General Services" substituted for "Director means the Director of the Office of Management and Budget" in par. (1) pursuant to Reorg. Plan No. 1 of 1977, §5F, 42 F.R. 56101, 91 Stat. 1634, set out in this Appendix, which transferred functions of Office of Management and Budget and Director thereof relating to Committee Management Secretariat to Administrator of General Services, effective Nov. 20, 1977, as provided by section 1 of Ex. Ord. No. 12024, Dec. 1, 1977, 42 F.R. 61445, set out under section 2 of this Act in this Appendix.

Commission on Government Procurement

Commission on Government Procurement, referred to in par. (2)(ii), terminated Apr. 30, 1973, pursuant to Pub. L. No. 91-129, set out as a note under section 251 of Title 41, Public Contracts.

§4. Applicability; restrictions

(a) The provisions of this Act or of any rule, order, or regulation promulgated under this Act shall apply to each advisory committee except to the extent that any Act of Congress establishing any such advisory committee specifically provides otherwise.

(b) Nothing in this Act shall be construed to apply to any advisory committee established or utilized by--

(1) the Central Intelligence Agency; or

(2) the Federal Reserve System.

(c) Nothing in this Act shall be construed to apply to any local civic group whose primary function is that of rendering a public service with respect to a Federal program, or any State or local committee, council, board, commission, or similar group established to advise or make recommendations to State or local officials or agencies.

(Pub. L. No. 92-463, §4, Oct. 6, 1972, 86 Stat. 771.)

§5. Responsibilities of Congressional committees; review; guidelines

(a) In the exercise of its legislative review function, each standing committee of the Senate and the House of Representatives shall make a continuing review of the activities of each advisory committee under its jurisdiction to determine whether such advisory committee should be abolished or merged with any other advisory committee, whether the responsibilities of such advisory committee should be revised, and whether such advisory committee performs a necessary function not already being performed. Each such standing committee shall take appropriate action to obtain the enactment of legislation necessary to carry out the purpose of this subsection.

(b) In considering legislation establishing, or authorizing the establishment of any advisory committee, each standing committee of the Senate and of the House of Representatives shall determine, and report such determination to the Senate or to the House of Representatives, as the case may be, whether the functions of the proposed advisory committee are being or could be performed by one or more agencies or by an advisory committee already in existence, or by enlarging the mandate of an existing advisory committee. Any such legislation shall--

(1) contain a clearly defined purpose for the advisory committee;

(2) require the membership of the advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee;

(3) contain appropriate provisions to assure that the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority or by any special interest, but will instead be the result of the advisory committee's independent judgment;

(4) contain provisions dealing with authorization of appropriations, the date for submission of reports (if any), the duration of the advisory committee, and the publication of reports and other materials, to the extent that the standing committee determines the provisions of section 10 of this Act to be inadequate; and

(5) contain provisions which will assure that the advisory committee will have adequate staff (either supplied by an agency or employed by it), will be provided adequate quarters, and will have funds available to meet its other necessary expenses.

(c) To the extent they are applicable, the guidelines set out in subsection (b) of this section shall be followed by the President, agency heads, or other Federal officials in creating an advisory committee.
(Pub. L. No. 92-463, §5, Oct. 6, 1972, 86 Stat. 771.)

§6. Responsibilities of the President; report to Congress; annual report to Congress; exclusion

(a) The President may delegate responsibility for evaluating and taking action, where appropriate, with respect to all public recommendations made to him by Presidential advisory committees.

(b) Within one year after a Presidential advisory committee has submitted a public report to the President, the President or his delegate shall make a report to the Congress stating either his proposals for action or his reasons for inaction, with respect to the recommendations contained in the public report.

(c) The President shall, not later than December 31 of each year, make an annual report to the Congress on the activities, status, and changes in the composition of advisory committees in existence during the preceding fiscal year. The report shall contain the name of every advisory committee, the date of and authority for its creation, its termination date or the date it is to make a report, its functions, a reference to the reports it has submitted, a statement of whether it is an ad hoc or continuing body, the dates of its meetings, the names and occupations of its current members, and the total estimated annual cost to the United States to fund, service, supply, and maintain such committee. Such report shall include a list of those advisory committees abolished by the President, and in the case of advisory committees established by statute, a list of those advisory committees which the President recommends be abolished together with his reasons therefor. The President shall exclude from this report any information which, in his judgment, should be withheld for reasons of national security, and he shall include in such report a statement that such information is excluded.
(Pub. L. No. 92-463, §6, Oct. 6, 1972, 86 Stat. 772; Pub. L. No. 97-375, title II, §201(c), Dec. 21, 1982, 96 Stat. 1822.)

§7. Responsibilities of the Administrator of General Services; Committee Management Secretariat, establishment; review; recommendations to President and Congress; agency cooperation; performance guidelines; uniform pay guidelines; travel expenses; expense recommendations

(a) The Administrator shall establish and maintain within the General Services Administration a Committee Management Secretariat, which shall be responsible for all matters relating to advisory committees.

(b) The Administrator shall, immediately after October 6, 1972, institute a comprehensive review of the activities and responsibilities of each advisory committee to determine--

(1) whether such committee is carrying out its purpose;

(2) whether, consistent with the provisions of applicable statutes, the responsibilities assigned to it should be revised;

(3) whether it should be merged with other advisory committees; or

(4) whether it should be abolished.

The Administrator may from time to time request such information as he deems necessary to carry out his functions under this subsection. Upon the completion of the Administrator's review he shall make recommendations to the President and to either the agency head or the Congress with respect to action he believes should be taken. Thereafter, the Administrator shall carry out a similar review annually. Agency heads shall cooperate with the Administrator in making the reviews required by this subsection.

(c) The Administrator shall prescribe administrative guidelines and management controls applicable to advisory committees, and, to the maximum extent feasible, provide advice, assistance, and guidance to advisory committees to improve their performance. In carrying out his functions under this subsection, the Administrator shall consider the recommendations of each agency head with respect to means of improving the performance of advisory committees whose duties are related to such agency.

(d)(1) The Administrator, after study and consultation with the Director of the Office of Personnel Management, shall establish guidelines with respect to uniform fair rates of pay for comparable services of members, staffs, and consultants of advisory committees in a manner which gives appropriate recognition to the responsibilities and qualifications required and other relevant factors. Such regulations shall provide that--

(A) no member of any advisory committee or of the staff of any advisory committee shall receive compensation at a rate in excess of the rate specified for GS-18 of the General Schedule under section 5332 of title 5, United States Code;

(B) such members, while engaged in the performance of their duties away from their homes or regular places of business, may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of title 5, United States Code, for persons employed intermittently in the Government service; and

(C) such members--

(i) who are blind or deaf or who otherwise qualify as handicapped individuals (within the meaning of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 794)), and

(ii) who do not otherwise qualify for assistance under section 3102 of title 5, United States Code, by reason of being an employee of an agency (within the meaning of section 3102(a)(1) of such title 5),

may be provided services pursuant to section 3102 of such title 5 while in performance of their advisory committee duties.

(2) Nothing in this subsection shall prevent--

(A) an individual who (without regard to his service with an advisory committee) is a full-time employee of the United States, or

(B) an individual who immediately before his service with an advisory committee was such an employee,

from receiving compensation at the rate at which he otherwise would be compensated (or was compensated) as a full-time employee of the United States.

(e) The Administrator shall include in budget recommendations a summary of the amounts he deems necessary for the expenses of advisory committees, including the expenses for publication of reports where appropriate.

(Pub. L. No. 92-463, §7, Oct. 6, 1972, 86 Stat. 772; 1977 Reorg. Plan No. 1, §5F, eff. Nov. 20, 1977, 42 F.R. 56101, 91 Stat. 1634; 1978 Reorg. Plan No. 2, §102, eff. Jan. 1, 1979, 43 F.R. 36067, 92 Stat. 3783; Pub. L. No. 96-523, §2, Dec. 12, 1980, 94 Stat. 3040.)

§8. Responsibilities of agency heads; Advisory Committee Management Officer, designation

(a) Each agency head shall establish uniform administrative guidelines and management controls for advisory committees established by that agency, which shall be consistent with directives of the Administrator under section 7 and section 10. Each agency shall maintain systematic information on the nature,functions, and operations of each advisory committee within its jurisdiction.

(b) The head of each agency which has an advisory committee shall designate an Advisory Committee Management Officer who shall--

(1) exercise control and supervision over the establishment, procedures, and accomplishments of advisory committees established by that agency;

(2) assemble and maintain the reports, records, and other papers of any such committee during its existence; and

(3) carry out, on behalf of that agency, the provisions of section 552 of title 5, United States Code, with respect to such reports, rec-ords, and other papers.
(Pub. L. No. 92-463, §8, Oct. 6, 1972, 86 Stat. 773; 1977 Reorg. Plan No. 1, §5F, eff. Nov. 20, 1977, 42 F.R. 56101, 91 Stat. 1634.)

§9. Establishment and purpose of advisory committees; publication in Federal Register; charter: filing, contents, copy

(a) No advisory committee shall be established unless such establishment is--

(1) specifically authorized by statute or by the President; or

(2) determined as a matter of formal record, by the head of the agency involved after consultation with the Administrator, with timely notice published in the Federal Register, to be in the public interest in connection with the performance of duties imposed on that agency by law.

(b) Unless otherwise specifically provided by statute or Presidential directive, advisory committees shall be utilized solely for advisory functions. Determinations of action to be taken and policy to be expressed with respect to matters upon which an advisory committee reports or makes recommendations shall be made solely by the President or an officer of the Federal Government.

(c) No advisory committee shall meet or take any action until an advisory committee charter has been filed with (1) the Administrator, in the case of Presidential advisory committees, or (2) with the head of the agency to whom any advisory committee reports and with the standing committees of the Senate and of the House of Representatives having legislative jurisdiction of such agency. Such charter shall contain the following information:

(A) the committee's official designation;

(B) the committee's objectives and the scope of its activity;

(C) the period of time necessary for the committee to carry out its purposes;

(D) the agency or official to whom the committee reports;

(E) the agency responsible for providing the necessary support for the committee;

(F) a description of the duties for which the committee is responsible, and, if such duties are not solely advisory, a specification of the authority for such functions;

(G) the estimated annual operating costs in dollars and man-years for such committee;

(H) the estimated number and frequency of committee meetings;

(I) the committee's termination date, if less than two years from the date of the committee's establishment; and

(J) the date the charter is filed.

A copy of any such charter shall also be furnished to the Library of Congress.

(Pub. L. No. 92-463, §9, Oct. 6, 1972, 86 Stat. 773; 1977 Reorg. Plan No. 1, §5F, eff. Nov. 20, 1977, 42 F.R. 56101, 91 Stat. 1634.)

§10. Advisory committee procedures; meetings; notice, publication in Federal Register; regulations; minutes; certification; annual report; Federal officer or employee, attendance

(a)(1) Each advisory committee meeting shall be open to the public.

(2) Except when the President determines otherwise for reasons of national security, timely notice of each such meeting shall be published in the Federal Register, and the Administrator shall prescribe regulations to provide for other types of public notice to insure that all interested persons are notified of such meeting prior thereto.

(3) Interested persons shall be permitted to attend, appear before, or file statements with any advisory committee, subject to such reasonable rules or regulations as the Administrator may prescribe.

(b) Subject to section 552 of title 5, United States Code, the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying at a single location in the offices of the advisory committee or the agency to which the advisory committee reports until the advisory committee ceases to exist.

(c) Detailed minutes of each meeting of each advisory committee shall be kept and shall contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached, and copies of all reports received, issued, or approved by the advisory committee. The accuracy of all minutes shall be certified to by the chairman of the advisory committee.

(d) Subsections (a)(1) and (a)(3) of this section shall not apply to any portion of an advisory committee meeting where the President, or the head of the agency to which the advisory committee reports, determines that such portion of such meeting may be closed to the public in accordance with subsection (c) of section 552b of title 5, United States Code. Any such determination shall be in writing and shall contain the reasons for such determination. If such a determination is made, the advisory committee shall issue a report at least annually setting forth a summary of its activities and such related matters as would be informative to the public consistent with the policy of section 552(b) of title 5, United States Code.

(e) There shall be designated an officer or employee of the Federal Government to chair or attend each meeting of each advisory committee. The officer or employee so designated is authorized, whenever he determines it to be in the public interest, to adjourn any such meeting. No advisory committee shall conduct any meeting in the absence of that officer or employee.

(f) Advisory committees shall not hold any meetings except at the call of, or with the advance approval of, a designated officer or employee of the Federal Government, and in the case of advisory committees (other than Presidential advisory committees), with an agenda approved by such officer or employee.

(Pub. L. No. 92-463, §10, Oct. 6, 1972, 86 Stat. 774; Pub. L. No. 94-409, §5(c), Sept. 13, 1976, 90 Stat. 1247; 1977 Reorg. Plan No. 1, §5F, eff. Nov. 20, 1977, 42 F.R. 56101, 91 Stat. 1634.)

§11. Availability of transcripts; "agency proceeding"

(a) Except where prohibited by contractual agreements entered into prior to the effective date of this Act, agencies and advisory committees shall make available to any person, at actual cost of duplication, copies of transcripts of agency proceedings or advisory committee meetings.

(b) As used in this section "agency proceeding" means any proceeding as defined in section 551(12) of title 5, United States Code.

(Pub. L. No. 92-463, §11, Oct. 6, 1972, 86 Stat. 775.)

§12. Fiscal and administrative provisions; record-keeping; audit; agency support services

(a) Each agency shall keep records as will fully disclose the disposition of any funds which may be at the disposal of its advisory committees and the nature and extent of their activities. The General Services Administration, or such other agency as the President may designate, shall maintain financial records with respect to Presidential advisory committees. The Comptroller General of the United States, or any of his authorized representatives, shall have access, for the purpose of audit and examination, to any such records.

(b) Each agency shall be responsible for providing support services for each advisory committee established by or reporting to it unless the establishing authority provides otherwise. Where any such advisory committee reports to more than one agency, only one agency shall be responsible for support services at any one time. In the case of Presidential advisory committees, such services may be provided by the General Services Administration.

(Pub. L. No. 92-463, §12, Oct. 6, 1972, 86 Stat. 775.)

§13. Responsibilities of Library of Congress; reports and background papers; depository

Subject to section 552 of title 5, United States Code, the Administrator shall provide for the filing with the Library of Congress of at least eight copies of each report made by every advisory committee and, where appropriate, background papers prepared by consultants. The Librarian of Congress shall establish a

depository for such reports and papers where they shall be available to public inspection and use.
(Pub. L. No. 92-463, §13, Oct. 6, 1972, 86 Stat. 775; 1977 Reorg. Plan No. 1, §5F, eff. Nov. 20, 1977, 42 F.R. 56101, 91 Stat. 1634.)

§14. Termination of advisory committees; renewal; continuation

(a)(1) Each advisory committee which is in existence on the effective date of this Act shall terminate not later than the expiration of the two-year period following such effective date unless--

(A) in the case of an advisory committee established by the President or an officer of the Federal Government, such advisory committee is renewed by the President or that officer by appropriate action prior to the expiration of such two-year period; or

(B) in the case of an advisory committee established by an Act of Congress, its duration is otherwise provided for by law.

(2) Each advisory committee established after such effective date shall terminate not later than the expiration of the two-year period beginning on the date of its establishment unless--

(A) in the case of an advisory committee established by the President or an officer of the Federal Government such advisory committee is renewed by the President or such officer by appropriate action prior to the end of such period; or

(B) in the case of an advisory committee established by an Act of Congress, its duration is otherwise provided for by law.

(b)(1) Upon the renewal of any advisory committee, such advisory committee shall file a charter in accordance with section 9(c).

(2) Any advisory committee established by an Act of Congress shall file a charter in accordance with such section upon the expiration of each successive two-year period following the date of enactment of the Act establishing such advisory committee.

(3) No advisory committee required under this subsection to file a charter shall take any action (other than preparation and filing of such charter) prior to the date on which such charter is filed.

(c) Any advisory committee which is renewed by the President or any officer of the Federal Government may be continued only for successive two-year periods by appropriate action taken by the President or such officer prior to the date on which such advisory committee would otherwise terminate.
(Pub. L. No. 92-463, §14, Oct. 6, 1972, 86 Stat. 776.)

§15. Effective date

Except as provided in section 7(b), this Act shall become effective upon the expiration of ninety days following October 6, 1972.
(Pub. L. No. 92-463, §15, Oct. 6, 1972, 86 Stat. 776.)

General Services Administration
Federal Advisory Committee Management Regulations
41 CFR §§101-6.1001 to 101-6.1035 (1990)

Subparts 101-6.5—101-6.9—[Reserved]

Subpart 101-6.10—Federal Advisory Committee Management

AUTHORITY: Sec. 205(c), 63 Stat. 390; 40 U.S.C. 486(c); sec. 7, 5 U.S.C., App.; and E.O. 12024, 3 CFR 1977 Comp., p. 158.

SOURCE: 52 FR 45929, Dec. 2, 1987, unless otherwise noted.

§ 101-6.1001 Scope.

(a) This subpart defines the policies, establishes minimum requirements, and provides guidance to agency management for the establishment, operation, administration, and duration of advisory committees subject to the Federal Advisory Committee Act, as amended. Reporting requirements which keep the Congress and the public informed of the number, purpose, membership activities, and cost of these advisory committees are also included.

(b) The Act and this subpart do not apply to advisory meetings or groups listed in § 101-6.1004.

[52 FR 45929, Dec. 2, 1987, as amended at 54 FR 41215, Oct. 5, 1989]

§ 101-6.1002 Policy.

The policy to be followed by Federal departments, agencies, and commissions, consistent with the Federal Advisory Committee Act, as amended, is as follows:

(a) An advisory committee shall be established only when it is essential to the conduct of agency business. Decision criteria include whether committee deliberations will result in the creation or elimination of, or change in regulations, guidelines, or rules affecting agency business; whether the information to be obtained is already available through another advisory committee or source within the Federal Government; whether the committee will make recommendations resulting in significant improvements in service or reductions in cost; or whether the committee's recommendations will provide an important additional perspective or viewpoint impacting agency operations;

(b) An advisory committee shall be terminated whenever the stated objectives of the committee have been accomplished; the subject matter or work of the committee has become obsolete by the passing of time or the assumption of the committee's main functions by another entity within the Federal Government; or the agency determines that the cost of operation is excessive in relation to the benefits accruing to the Federal Government;

(c) An advisory committee shall be fairly balanced in its membership in terms of the points of view represented and the functions to be performed; and

(d) An advisory committee shall be open to the public in its meetings except in those circumstances where a closed meeting shall be determined proper and consistent with the provisions in the Government in the Sunshine Act, 5 U.S.C. 552(b).

[52 FR 45929, Dec. 2, 1987, as amended at 54 FR 41215, Oct. 5, 1989]

§ 101-6.1003 Definitions.

Act means the Federal Advisory Committee Act, as amended, 5 U.S.C., App.

Administrator means the Administrator of General Services.

Advisory committee subject to the Act means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof, which is established by statute, or established or utilized by the President or any agency official for the purpose of obtaining advice or recommendations on issues or policies which are within the scope of his or her responsibilities.

Agency has the same meaning as in section 551(1) of title 5 of the United States Code.

Committee Management Secretariat (Secretariat), established pursuant to the Act is responsible for all matters relating to advisory committees, and carries out the Administrator's responsibilities under the Act and Executive Order 12024.

Committee member means an individual who serves by appointment on an advisory committee and has the full right and obligation to participate in the activities of the committee, including voting on committee recommendations.

Presidential advisory committee means any advisory committee which advises the President. It may be established by the President or by the Congress, or used by the President in the interest of obtaining advice or recommendations for the President. "Independent Presidential advisory committee" means any Presidential advisory committee not assigned by the President, or the President's delegate, or by the Congress in law, to an agency for administrative and other support and for which the Administrator of General Services may provide administrative and other support on a reimbursable basis.

Staff member means any individual who serves in a support capacity to an advisory committee.

Utilized (or *used*), as referenced in the definition of "Advisory committee" in this section, means a committee or other group composed in whole or in part of other than full-time officers or employees of the Federal Government with an established existence outside the agency seeking its advice which the President or agency official(s) adopts, such as through institutional arrangements, as a preferred source from which to obtain advice or recommendations on a specific issue or policy within the scope of his or her responsibilities in the same manner as that individual would obtain advice or recommendations from an established advisory committee.

§ 101-6.1004 Examples of advisory meetings or groups not covered by the Act or this subpart.

The following are examples of advisory meetings or groups not covered by the Act or this subpart:

(a) Any committee composed wholly of full-time officers or employees of the Federal Government;

(b) Any advisory committee specifically exempted by an Act of Congress;

(c) Any advisory committee established or utilized by the Central Intelligence Agency;

(d) Any advisory committee established or utilized by the Federal Reserve System;

(e) The Advisory Committee on Intergovernmental Relations;

(f) Any local civic group whose primary function is that of rendering a public service with respect to a Federal program, or any State or local committee, council, board, commission, or similar group established to advise or make recommendations to State or local officials or agencies;

(g) Any committee which is established to perform primarily operational as opposed to advisory functions. Operational functions are those specifically provided by law, such as making or implementing Government decisions or policy. An operational committee may be covered by the Act if it becomes primarily advisory in nature. It is the responsibility of the administering agency to determine whether such a committee is primarily operational. If so, it would not fall under the requirements of the Act and this Subpart, but would continue to be regulated under relevant laws, subject to the direction of the President and the review of the appropriate legislative committees;

(h) Any meeting initiated by the President or one or more Federal official(s) for the purpose of obtaining advice or recommendations from one individual;

(i) Any meeting initiated by a Federal official(s) with more than one individual for the purpose of obtaining the advice of individual attendees and not for the purpose of utilizing the group to obtain consensus advice or recommendations. However, agencies should be aware that such a group would be covered by the Act when an agency accepts the group's deliberations as a source of consensus advice or recommendations;

(j) Any meeting initiated by a group with the President or one or more Federal official(s) for the purpose of expressing the group's view, provided that the President or Federal official(s) does not use the group recurrently as a preferred source of advice or recommendations;

(k) Meetings of two or more advisory committee or subcommittee members convened solely to gather information or conduct research for a chartered advisory committee, to analyze relevant issues and facts, or to draft proposed position papers for deliberation by the advisory committee or a subcommittee of the advisory committee; or

(l) Any meeting with a group initiated by the President or one or more Federal official(s) for the purpose of exchanging facts or information.

§ 101-6.1005 Authorities for establishment of advisory committees.

An advisory committee may be established in one of four ways:

(a) By law where the Congress specifically directs the President or an agency to establish it;

(b) By law where the Congress authorizes but does not direct the President or an agency to establish it. In this instance, the responsible agency head shall follow the procedures provided in § 101-6.1007;

(c) By the President by Executive Order; or

(d) By an agency under general agency authority in Title 5 of the United States Code or under other general agency-authorizing law. In this instance, an agency head shall follow the procedures provided in § 101-6.1007.

§ 101-6.1006 [Reserved]

§ 101-6.1007 Agency procedures for establishing advisory committees.

(a) When an agency head decides that it is necessary to establish a committee, the agency must consider the functions of similar committees in the same agency before submitting a consultation to GSA to ensure that no duplication of effort will occur.

(b) In establishing or utilizing an advisory committee, the head of an agency or designee shall comply with the Act and this subpart, and shall:

(1) Prepare a proposed charter for the committee which includes the information listed in section 9(c) of the Act; and

(2) Submit a letter and the proposed charter to the Secretariat proposing to establish or use, reestablish, or renew an advisory committee. The letter shall include the following information:

(i) An explanation of why the committee is essential to the conduct of agency business and in the public interest;

(ii) An explanation of why the committee's functions cannot be performed by the agency, another existing advisory committee of the agency, or other means such as a public hearing; and

(iii) A description of the agency's plan to attain fairly balanced membership. The plan will ensure that, in the selection of members for the committee, the agency will consider a cross-section of those directly affected, interested, and qualified, as appropriate to the nature and functions of the committee. Committees requiring technical expertise should include persons with demonstrated professional or personal qualifications and experience relevant to the functions and tasks to be performed.

(3) Subcommittees that do not function independently of the full or parent advisory committee need not follow the requirements of paragraphs (b)(1) and (b)(2) of this section. However, they are subject to all other requirements of the Act.

(4) The requirements of paragraphs (b)(1) and (b)(2) of this section shall apply for any subcommittee of a chartered advisory committee, whether its members are drawn in whole or in part from the full or parent advisory committee, which functions independently of the parent advisory committee such as by making recommendations directly to the agency rather than for consideration by the chartered advisory committee.

(c) The Secretariat will review the proposal and notify the agency of GSA's views within 15 calendar days of receipt, if possible. The agency head retains final authority for establishing a particular advisory committee.

(d) The agency shall notify the Secretariat in writing that either:

(1) The advisory committee is being established. The filing of the advisory committee charter as specified in § 101–6.1013 shall be considered appropriate written notification in this instance. The date of filing constitutes the date of establishment or renewal. The agency head shall then comply with the provisions of § 101–6.1009 for an established advisory committee; or

(2) The advisory committee is not being established. In this instance, the agency shall also advise the Secretariat if the agency head intends to take any further action with respect to the proposed advisory committee.

[52 FR 45929, Dec. 2, 1987, as amended at 54 FR 41215, Oct. 5, 1989]

§ 101–6.1008 The role of GSA.

(a) The functions under section 7 of the Act will be performed for the Administrator by the Secretariat. The Secretariat assists the Administrator in prescribing administrative guidelines and management controls for advisory committees, and assists other agencies in implementing and interpreting these guidelines. In exercising internal controls over the management and supervision of the operations and procedures vested in each agency by section 8(b) of the Act and by § 101–6.1009 and § 101–6.1017 of this rule, agencies shall conform to the guidelines prescribed by GSA.

(b) The Secretariat may request comments from agencies on management guidelines and policy issues of broad interagency interest or application to the Federal advisory committee program.

(c) In advance of issuing informal guidelines, nonstatutory reporting requirements, and administrative procedures such as report formats or automation, the Secretariat shall request formal or informal comments from agency Committee Management Officers.

(d) The Secretariat shall assure that follow-up reports required by section 6(b) of the Act are prepared and transmitted to the Congress as directed by the President; either by his delegate, by the agency responsible for providing support to a Presidential advisory committee, or by the responsible agency or organization designated pursuant to paragraph (c) of § 101-6.1011. In performing this function, GSA may solicit the assistance of the Office of Management and Budget and other appropriate organizations, as deemed appropriate.

[52 FR 45929, Dec. 2, 1987, as amended at 54 FR 41215, Oct. 5, 1989]

§ 101-6.1009 Responsibilities of an agency head.

The head of each agency that uses one or more advisory committees shall ensure:

(a) Compliance with the Act and this subpart;

(b) Issuance of administrative guidelines and management controls which apply to all advisory committees established or used by the agency;

(c) Designation of a Committee Management Officer who shall carry out the functions specified in section 8(b) of the Act;

(d) Provision of a written determination stating the reasons for closing any advisory committee meeting to the public;

(e) A review, at least annually, of the need to continue each existing advisory committee, consistent with the public interest and the purpose and functions of each committee;

(f) Rates of pay are justified and levels of agency support are adequate;

(g) The appointment of a Designated Federal Officer for each advisory committee and its subcommittees;

(h) The opportunity for reasonable public participation in advisory committee activities;

(i) That the number of committee members is limited to the fewest necessary to accomplish committee objectives;

(j) That the interests and affiliations of advisory committee members are reviewed consistent with regulations published by the Office of Government Ethics in 5 CFR parts 734, 735, and 737, and additional requirements, if any, established by the sponsoring agency pursuant to Executive Order 12674, the conflict-of-interest statutes, and the Ethics in Government Act of 1978, as amended; and

(k) Unless otherwise specified by the President, the preparation and transmittal of a follow-up report to the Congress detailing the disposition of the public recommendations of a Presidential advisory committee supported by the agency, in accordance with sections 6(b) of the Act.

[52 FR 45929, Dec. 2, 1987, as amended at 54 FR 41215, Oct. 5, 1989]

§ 101-6.1010 [Reserved]

§ 101-6.1011 Responsibilities of the chairperson of an independent Presidential advisory committee.

The chairperson of an independent Presidential advisory committee shall comply with the Act and this subpart and shall:

(a) Consult with the Administrator concerning the role of the Designated Federal Officer and Committee Management Officer;

(b) Fulfill the responsibilities of an agency head as specified in paragraphs (d), (h) and (j) of § 101-6.1009; and

(c) Unless otherwise specified by the President, consult with the Administrator regarding the designation of an agency or organization responsible for implementing section 6(b) of the Act.

[52 FR 45929, Dec. 2, 1987, as amended at 54 FR 41216, Oct. 5, 1989]

§ 101-6.1012 [Reserved]

§ 101-6.1013 Charter filing requirements.

No advisory committee may operate, meet, or take any action until its charter has been filed as follows:

(a) *Advisory committee established, used, reestablished, or renewed by an agency.* The agency head shall file—

(1) The charter with the standing committees of the Senate and the House of Representatives having legislative jurisdiction of the agency;

(2) A copy of the filed charter with the Library of Congress, Exchange and Gift Division, Federal Documents

Section, Federal Advisory Committee Desk, Washington, DC 20540; and

(3) A copy of the charter indicating the Congressional filing date, with the Secretariat.

(b) *Advisory committee specifically directed by law or authorized by law.* Procedures are the same as in paragraph (a) of this section.

(c) *Presidential advisory committee.* When either the President or the Congress establishes an advisory committee that advises the President, the responsible agency head or, in the case of an independent Presidential advisory committee, the President's designee shall file—

(1) The charter with the Secretariat;

(2) A copy of the filed charter with the Library of Congress; and

(3) If specifically directed by law, a copy of the charter indicating its date of filing with the Secretariat, with the standing committees on the Senate and the House of Representatives having legislative jurisdiction of the agency or the independent Presidential advisory committee.

§ 101-6.1014 [Reserved]

§ 101-6.1015 Advisory committee information which must be published in the Federal Register.

(a) *Committee establishment, reestablishment, or renewal.* (1) A notice in the FEDERAL REGISTER is required when an advisory committee, except a committee specifically directed by law or established by the President by Executive Order, is established, used, reestablished, or renewed. Upon receiving notification of the completed review from the Secretariat in accordance with paragraph (c) of § 101-6.1007, the agency shall publish a notice in the FEDERAL REGISTER that the committee is being established, used, reestablished, or renewed. For a new committee, such notice shall also describe the nature and purpose of the committee and the agency's plan to attain fairly balanced membership, and shall include a statement that the committee is necessary and in the public interest.

(2) Establishment and reestablishment notices shall appear at least 15 calendar days before the committee charter is filed, except that the Secretariat may approve less than 15 days when requested by the agency for good cause. The 15-day advance notice requirement does not apply to committee renewals, notices of which may be published concurrently with the filing of the charter.

(b) *Committee meetings.* (1) The agency or an independent Presidential advisory committee shall publish at least 15 calendar days prior to an advisory committee meeting a notice in the FEDERAL REGISTER, which includes:

(i) The exact name of the advisory committee as chartered;

(ii) The time, date, place, and purpose of the meeting;

(iii) A summary of the agenda; and

(iv) A statement whether all or part of the meeting is open to the public or closed, and if closed, the reasons why, citing the specific exemptions of the Government in the Sunshine Act (5 U.S.C. 552(b)) as the basis for closure.

(2) In exceptional circumstances, the agency or an independent Presidential advisory committee may give less than 15 days notice, provided that the reasons for doing so are included in the committee meeting notice published in the FEDERAL REGISTER.

[52 FR 45929, Dec. 2, 1987, as amended at 54 FR 41216, Oct. 5, 1989]

§ 101-6.1016 [Reserved]

§ 101-6.1017 Responsibilities of the agency Committee Management Officer.

In addition to implementing the provisions of section 8(b) of the Act, the Committee Management Officer will carry out all responsibilities delegated by the agency head. The Committee Management Officer should also ensure that section 10(b), 12(a) and 13 of the Act are implemented by the agency to provide for appropriate recordkeeping. Records include, but are not limited to:

(a) A set of approved charters and membership lists for each advisory committee;

(b) Copies of the agency's portion of the Annual Report of Federal Advisory Committees required by paragraph (b) of § 101-6.1035;

(c) Agency guidelines on committee management operations and procedures as maintained and updated; and

(d) Agency determinations to close advisory committee meetings as required by paragraph (c) of § 101-6.1023.

§ 101-6.1018 [Reserved]

§ 101-6.1019 Duties of the Designated Federal Officer.

The agency head or, in the case of an independent Presidential advisory committee, the Administrator shall designate a Federal officer or employee, who may be either full-time or permanent part-time, to be the Designated Federal Officer for each advisory committee and its subcommittees, who:

(a) Must approve or call the meeting of the advisory committee;

(b) Must approve the agenda;

(c) Must attend the meetings;

(d) Shall adjourn the meetings when such adjournment is in the public interest; and

(e) Chairs the meeting when so directed by the agency head.

(f) The requirement in paragraph (b) of this section does not apply to a Presidential advisory committee.

§ 101-6.1020 [Reserved]

§ 101-6.1021 Public participation in advisory committee meetings.

The agency head, or the chairperson of an independent Presidential advisory committee, shall ensure that—

(a) Each advisory committee meeting is held at a reasonable time and in a place reasonably accessible to the public;

(b) The meeting room size is sufficient to accommodate advisory committee members, committee or agency staff, and interested members of the public;

(c) Any member of the public is permitted to file a written statement with the advisory committee; and

(d) Any member of the public may speak at the advisory committee meeting if the agency's guidelines so permit.

§ 101-6.1022 [Reserved]

§ 101-6.1023 Procedures for closing an advisory committee meeting.

(a) To close all or part of a meeting, an advisory committee shall submit a request to the agency head or, in the case of an independent Presidential advisory committee, the Administrator, citing the specific provisions of the Government in the Sunshine Act (5 U.S.C. 552(b)) which justify the closure. The request shall provide the agency head or the Administrator sufficient time to review the matter in order to make a determination prior to publication of the meeting notice required by § 101-6.1015(b).

(b) The general counsel of the agency or, in the case of an independent Presidential advisory committee, the general counsel of the General Services Administration should review all requests to close meetings.

(c) If the agency head or, in the case of an independent Presidential advisory committee, the Administrator agrees that the request is consistent with the provisions in the Government in the Sunshine Act and the Federal Advisory Committee Act, he or she shall issue a determination that all or part of the meeting be closed.

(d) The agency head, or the chairperson of an independent Presidential advisory committee, shall:

(1) Make a copy of the determination available to the public upon request; and

(2) State the reasons why all or part of the meeting is closed, citing the specific exemptions used from the Government in the Sunshine Act in the meeting notice published in the FEDERAL REGISTER.

§ 101-6.1024 [Reserved]

§ 101-6.1025 Requirement for maintaining minutes of advisory committee meetings.

(a) The agency head or, in the case of an independent Presidential advisory committee, the chairperson shall ensure that detailed minutes of each advisory committee meeting are kept. The minutes must include:

(1) Time, date, and place;

(2) A list of the following persons who were present:

(i) Advisory committee members and staff;

(ii) Agency employees; and

(iii) Members of the public who presented oral or written statements;

(3) An estimated number of other members of the public present;

(4) An accurate description of each matter discussed and the resolution, if any, made by the committee of such matter; and

(5) Copies of each report or other document received, issued, or approved by the committee.

(b) The chairperson of each advisory committee shall certify to the accuracy of all minutes of advisory committee meetings.

§ 101–6.1026 [Reserved]

§ 101–6.1027 Termination of advisory committees.

(a) Any advisory committee shall automatically terminate not later than 2 years after it is established, reestablished, or renewed, unless:

(1) Its duration is otherwise provided for by law;

(2) The President or agency head renews it prior to the end of such period; or

(3) The President or agency head terminates it before that time by revoking or abolishing its establishment authority.

(b) If an agency head terminates an advisory committee, the agency shall notify the Secretariat of the effective date of termination.

§ 101–6.1028 [Reserved]

§ 101–6.1029 Renewal and rechartering of advisory committees.

(a) Advisory committees specifically directed by law:

(1) Whose duration extends beyond 2 years shall require rechartering by the filing of a new charter every 2 years after the date of enactment of the law establishing the committee. If a new charter is not filed, the committee is not terminated, but may not meet or take any action.

(2) Which would terminate under the provisions of section 14 of the Act, and for which renewal would require reauthorization by law, may be reestablished by an agency provided that the agency complies under general agency authority with the provisions of § 101–6.1007.

(b) Advisory committees established by the President may be renewed by appropriate action of the President and the filing of a new charter.

(c) Advisory committees authorized by law or established or used by an agency may be renewed, provided that at least 30 but not more than 60 days before the committee terminates, an agency head who intends to renew a committee complies with the provisions of § 101–6.1007.

§ 101–6.1030 [Reserved]

§ 101–6.1031 Amendments to advisory committee charters.

(a) *Committees specifically directed by law or authorized by law; or established by the President.* The agency head shall be responsible for ensuring that any minor technical changes made to current charters are consistent with the relevant statute or Executive Order. When the Congress by law, or the President by Executive Order, changes the authorizing language which has been the basis for establishing an advisory committee, the agency head, or the chairperson of an independent Presidential advisory committee, shall:

(1) Amend those sections of the current charter affected by the new law or Executive Order; and

(2) File the amended charter as specified in § 101–6.1013.

(b) *Committees established or used by an agency.* The charter of an advisory committee established under general agency authority may be amended when an agency head determines that the existing charter no longer accurately reflects the objectives or functions of the committee. Changes may be minor, such as revising the name of the advisory committee, or modifying the estimated number or frequency of meetings. Changes may also be major such as those dealing with the objectives or composition of the committee. The agency head retains final authority for amending the charter of an advisory committee. Amending any existing advisory committee charter does not constitute renewal of the committee under § 101-6.1029.

(1) To make a minor amendment to a committee charter, an agency shall:

(i) Amend the charter language as necessary, and

(ii) File the amended charter as specified in § 101-6.1013.

(2) To make a major amendment to a committee charter, an agency shall:

(i) Amend the charter language as necessary;

(ii) Submit the proposed amended charter with a letter to the Secretariat requesting GSA's views on the amended language, along with an explanation of the purpose of the changes and why they are necessary. The Secretariat will review the proposed changes and notify the agency of GSA's views within 15 calendar days of the request, if possible; and

(iii) File the amended charter as specified in § 101-6.1013.

§ 101-6.1032 [Reserved]

§ 101-6.1033 Compensation and expense reimbursement of advisory committee members, staffs and consultants.

(a) *Uniform pay guidelines for members of an advisory committee.* Nothing in this subpart shall require an agency head to provide compensation, unless otherwise provided by law, to a member of an advisory committee. However, when compensation is deemed appropriate by an agency, it shall fix the pay of the members of an advisory committee to the daily equivalent of a rate of the General Schedule in 5 U.S.C. 5332 unless the members are appointed as consultants and compensated under 5 U.S.C. 3109. In determining an appropriate rate of pay for the members, an agency shall give consideration to the significance, scope, and technical complexity of the matters with which the advisory committee is concerned and the qualifications required of the members of the advisory committee. An agency may not fix the pay of the members of an advisory committee at a rate higher than the daily equivalent of the maximum rate for a GS-15 under the General Schedule, unless a higher rate is mandated by statute, or the head of the agency has personally determined that a higher rate of pay under the General Schedule is justified and necessary. Such a determination must be reviewed by the head of the agency annually. Under this subpart, an agency may not fix the pay of the members of an advisory committee at a rate of pay higher than the daily equivalent of a rate for a GS-18, as provided in 5 U.S.C. 5332.

(b) *Pay for staff members of an advisory committee.* An agency may fix the pay of each advisory committee staff member at a rate of the General Schedule in which the Staff member's position would appropriately be placed (5 U.S.C. Chapter 51). An agency may not fix the pay of a staff member at a rate higher than the daily equivalent of the maximum rate for GS-15, unless the agency head has determined that under the General Schedule the staff member's position would appropriately be placed at a grade higher than GS-15. This determination must be reviewed annually by the agency head.

(1) In establishing rates of compensation, the agency head shall comply with any applicable statutes, regulations, Executive Orders, and administrative guidelines.

(2) A staff member who is a Federal employee shall serve with the knowledge of the Designated Federal Officer and the approval of the employee's direct supervisor. If a non-Federal employee, the staff member shall be appointed in accordance with applicable agency procedures, following consultation with the advisory committee.

(c) *Pay for consultants to an advisory committee.* An agency shall fix the pay of a consultant to an advisory committee after giving consideration to the qualifications required of the consultant and the significance, scope, and technical complexity of the work. The compensation may not exceed the maximum rate of pay authorized by 5 U.S.C. 3109, and shall be in accordance with any applicable statutes, regulations, Executive Orders and administrative guidelines.

(d) *Gratuitous services.* In the absence of any special limitations applicable to a specific agency, nothing in this subpart shall prevent an agency from accepting the gratuitous services of an advisory committee member, staff member, or consultant who agrees in advance to serve without compensation.

(e) *Travel expenses.* Advisory committee members and staff members, while engaged in the performance of their duties away from their homes or regular places of business, may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of title 5, United States Code, for persons employed intermittently in the Government service.

(f) *Services for handicapped members.* While performing advisory committee duties, an advisory committee member who is blind or deaf or who qualifies as a handicapped individual may be provided services by a personal assistant for handicapped employees if the member:

(1) Qualifies as a handicapped individual as defined by section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 794); and

(2) Does not otherwise qualify for assistance under 5 U.S.C. 3102 by reason of being an employee of an agency.

(g) *Exclusions.* (1) Nothing in this section shall prevent any person who (without regard to his or her service with an advisory committee) is a full-time Federal employee from receiving compensation at a rate which he or she otherwise would be compensated as a full-time Federal employee.

(2) Nothing in this section shall prevent any person who immediately before his or her service with an advisory committee was a full-time Federal employee from receiving compensation at the rate at which he or she was compensated as a full-time Federal employee.

(3) Nothing in this section shall affect a rate of pay or a limitation on a rate of pay that is specifically established by law or a rate of pay established under the General Schedule classification and pay system in chapter 51 and chapter 53 of Title 5, United States Code.

§ 101-6.1034 [Reserved]

§ 101-6.1035 Reports required for advisory committees.

(a) Within one year after a Presidential advisory committee has submitted a public report to the President, a follow-up report will be prepared and transmitted to the Congress as determined under paragraph (d) of § 101-6.1008, detailing the disposition of the committee's recommendations in accordance with section 6(b) of the Act. Reports shall be consistent with specific instructions issued periodically by the Secretariat;

(b) The President's annual report to the Congress shall be prepared by GSA based on reports filed on a fiscal year basis by each agency consistent with the information specified in section 6(c) of the Act. Reports from agencies shall be consistent with instructions provided annually by the Secretariat. Agency reports shall also include information requested to enable the Secretariat to carry out the annual comprehensive review of each advisory committee as required by section 7(b) of the Act. These reports have been cleared in accordance with FIRMR subpart 201-45.6 in 41 CFR chapter 201 and assigned interagency report control number 0304-GSA-XX.

(c) In accordance with section 10(d) of the Act, advisory committees holding closed meetings shall issue reports at least annually, setting forth a summary of activities consistent with the policy of section 552(b) of title 5, United States Code.

(d) Subject to section 552 of title 5, United States Code, eight copies of each report made by an advisory committee, including any report on closed meetings as specified in paragraph (c) of this section, and, where appropriate, background papers prepared by consultants, shall be filed with the Library of Congress as required by section 13 of the Act, for public inspection and use at the location specified in paragraph (a)(2) of § 101-6.1013.

[52 FR 45929, Dec. 2, 1987, as amended at 54 FR 41216, Oct. 5, 1989]

Federal Tort Claims Act

Citations:

28 U.S. Code §§1291, 1346, 1402, 2401, 2402, 2411, 2412, 2671-80 (1990) (originally 28 U.S.C. §§921-946); enacted August 2, 1946 as title IV of the Legislative Reorganization Act of 1946 by Pub. L. No. 79-601, 60 Stat. 812-44; significantly amended July 18, 1966 by Pub. L. No. 89-506, 80 Stat. 306; March 16, 1974 by Pub. L. No. 93-253, 88 Stat. 50; November 18, 1988 by Pub. L. No. 100-694, 102 Stat. 4563-67; and November 15, 1990 by Pub. L. No. 101-552, 104 Stat. 2736.

Lead Agency:

Department of Justice, Torts Branch, Civil Division, 10th Street and Constitution Avenue NW, Room 3137, Washington, DC 20530 (202) 514-3309.

Overview:

Before 1946, the doctrine of sovereign immunity obliged almost all victims of government wrongdoing to seek relief via congressional enactment of a private bill. The Federal Tort Claims Act waived this defense to permit damage actions against the United States for injury, loss of property or death caused by the negligent or wrongful acts or omissions of federal employees acting within the scope of their employment. The Act provides that the United States shall be liable in the same manner and to the same extent as a private individual under like circumstances in accordance with the law of the place where the negligent or wrongful conduct occurred.

Administrative Claims. As first drafted, the FTCA sought to transfer to the federal courts primary responsibility for determining what redress was warranted, but amendments enacted in 1966 shifted much of that burden to the agencies. Claims must now be presented to the responsible agency as a prerequisite for suit (§2675(a)). The claim must be presented in writing within 2 years after it accrued and the agency has a minimum of 6 months in which to act. If the agency fails to make a final disposition of the claim within that period, the claimant, at anytime thereafter, may treat that as a denial and file suit.

Agencies may settle claims under the Act in any amount, subject, however, to prior written approval by the Attorney General or his designee for settlements in excess of a specified level (§2672),[1] and must exercise their settlement authority "in accordance with regulations prescribed by the Attorney General." (See Appendix.) These regulations are quite sparse.

As a result of the 1966 amendments, many agencies have established relatively elaborate procedures for the presentation, investigation, and administrative adjustment of tort claims. Today thousands of claims are disposed of at the agency level. Considerable litigation has occurred involving the statute of limitations and the sufficiency of claimants' administrative filings, particularly over agencies' authority to demand extensive information substantiating a claim and to regard a claim as invalid for all purposes when such data are not provided. A widely cited case, *Adams v. United States*, 615 F.2d 284, *on rehearing*, 622 F.2d 197 (5th Cir. 1980), holds that section 2675(a)'s mandate that a claim be filed initially with the agency requires only that the claimant place a monetary value on the claim and give sufficient written notice of the claim to enable the agency to conduct an investigation. Several prior decisions (e.g., *Swift v. United States*, 614 F.2d 812 (1st Cir. 1980)) had required considerably more of claimants. To make the agency-level process more open and less adversarial, the Conference has recommended a number of changes and has called for some amendments to the FTCA and the Attorney General's rules (Recommendation 84-7). The Administrative Dispute Resolution Act of 1990 implemented some of these changes.

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[1] The Administrative Dispute Resolution Act of 1990 (see Chapter 3), amended the FTCA to encourage agency use of arbitration and other alternative means of dispute resolution to resolve administrative tort claims. That Act also provided that the Department of Justice could raise any agency's authority to settle tort claims without prior Department of Justice approval from $25,000 to an amount not to exceed "the authority delegated by the Attorney General to the United States attorneys to settle claims for monetary damages against the United States." Pursuant to an analogous provision of another law, the Department of Veterans Affairs previously obtained authority to settle tort claims for up to $100,000.

Court Claims. If administrative settlement efforts fail, the claimant may sue either in the federal district court for the district in which the alleged negligent or wrongful act occurred or where he or she resides (§1402(b)), provided that the administrative claim was properly presented within 2 years after it accrued and suit is brought within 6 months after the agency's final denial (§2401(b)). Suit may be brought only against the United States, not against the federal agency. The only remedy under the FTCA is money damages; the Act does not authorize equitable remedies. The sum demand in the lawsuit generally cannot exceed the amount of the claim presented to the agency (§2675(b)). Liability and damage standards, in most instances, are based on the law of the place where the negligent or wrongful act occurred, except that the United States is not liable for punitive damages or prejudgment interest (§2674). Jury trials are not authorized under the FTCA, and attorneys' fees are subject to a ceiling of 20 percent of the amount recovered in agency-level settlements and 25 percent of judgments and litigation settlements (§2678).

Coverage. The FTCA contains more than a dozen exceptions (§2680). It does not apply, for example, to the following:

- Claims arising in a foreign country;
- Claims based upon the performance of a discretionary function;
- Claims arising out of the assessment or collection of any tax or customs duty;
- Claims covered by certain other statutes;
- Claims arising out of libel, slander, misrepresentation, deceit or interference with contract; and
- Claims arising out of assault, battery, false imprisonment, false arrest, malicious prosecution or abuse of process, except where based upon acts

or omissions of federal investigative or law enforcement officers occurring after 1974.

In addition, the FTCA does not apply to claims of members of the armed forces arising out of activity incident to their service (*Feres v. United States*, 340 U.S. 135 (1950)). Nor does it apply to injury claims of civilian federal employees arising in the performance of duty (their exclusive remedy against the government is under the Federal Employees' Compensation Act).

Congress considered several bills during the 1980s that would have expanded the Act to cover agency employees' actions that violate constitutional or statutory rights, a reform advocated by the Conference (Recommendation 82-6). Another subject of considerable commentary and legislative interest has been the scope of the discretionary function exception. None of the bills relating to these matters has received approval; and federal employees remain subject to personal damage suits for so-called constitutional torts.

In 1988, Congress did modify the FTCA to render it the exclusive remedy for common law torts--as opposed to actions that violate constitutional or statutory rights--committed by federal employees within the scope of their employment. This legislation was necessitated by the Supreme Court's decision in *Westfall v. Erwin*, 108 S.Ct. 580 (1988), which dramatically expanded the personal tort liability of federal employees. The 1988 amendments also made explicit that activities of officials of the judicial and legislative branches are covered by the FTCA, and preserved for the United States any defenses based upon judicial or legislative immunity that could have been asserted by the official individually.

Related Statutes. Besides the FTCA, more than 40 "meritorious claims" and other ancillary statutes afford an administrative or judicial remedy for certain additional kinds of losses occasioned by governmental action. These statutes vary considerably as to kinds of claims covered, claimants eligible, remedies available, proof required, and procedures followed. They include the Military and Foreign Claims Act, Coast Guard and National Guard Claims Acts, Small Claims Act, Copyright Infringement Act, Trading with the Enemy Act, Public Vessels Act, Suits in Admiralty Act, and statutes covering some actions of the Departments of State, Agriculture, HHS, and Justice, NASA, the NRC, the Peace Corps, and the Postal Service. They are catalogued and discussed in Lester Jayson's *Handling Federal Tort Claims* and George Bermann's *Administrative Handling of Monetary Claims*.

Legislative History:

Efforts at passage of legislation similar to the FTCA began in the 1920s; a measure with similar purposes was passed by the 70th Congress, but met with a pocket veto by President Coolidge. Twin bills in many respects identical to the present Act, H.R. 7236 and S. 2690, were introduced in the 76th Congress in 1940. H.R. 7236 passed the House, but after hearings the Senate Judiciary Committee did not report S. 2690 and the measure died. In the 77th Congress, the Senate passed S. 2221. The House Committee on the Judiciary, after hearings on similar measures introduced by Representative Celler, H.R. 5373 and H.R. 6463, reported the Senate measure favorably, with amendments, but it was not considered by the full House. (All these bills are reprinted in the reports of the committee hearings.) As thus amended, S. 2221 is a virtual duplicate of the Act finally passed by the 79th Congress in 1946.

Because of this similarity, the hearings and reports on the 1940 and 1942 measures are valuable source material in analyzing the FTCA, especially as the hearings and reports on the 1946 Act are relatively sparse. As Lester Jayson notes in discussing the more than 30 prior bills introduced in this area, "[S]ince many of the provisions of the Federal Tort Claims Act as it exists today have their genesis in these proposals, and since many of these provisions were the subjects of discussion and explanation at committee hearings and in committee reports, it often may prove to be fruitful, if not crucial, to [the practitioner's] presentation and preparation of a case involving the meaning or interpretation of some part of the existing law to examine its legislative history, and to review these earlier bills and hearings and reports."

Source Note:

The two most comprehensive sources are Jayson's three-volume *Handling Federal Tort Claims*, which treats FTCA litigation exhaustively, and George Bermann's *Administrative Handling of Monetary Claims* (1984), examining at length the operation of agencies' settlement processes and basic legal and procedural questions thereunder. Donald Zillman (1983) gives valuable information on presenting a claim. A useful Yale Law Journal note entitled "The Federal Tort Claims Act" (1947) examines the tort claims bills introduced between 1925 and 1946 (pages 2-55), along with significant committee reports and hearings relating to them.

The literature on officials' constitutional tort liability is vast, and Thomas Madden and Nicholas Allard's *Advice on Official Liability and Immunity* (1982) contains an extensive annotated bibliography. *Suing Government* (1983) offers an overview of these issues. Several more recent articles on the subject are listed in the Bibliography. Numerous articles, very few of which are listed below, deal with the government's potential liability in a variety of specific situations, including negligent occupational, mine or airplane safety inspections, improper customs seizures, weather forecasts, parole of dangerous criminals, atomic testing, and medical or other cases involving the military.

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3. *Hearings before the Joint Committee on the Organization of Congress Pursuant to H. Con. Res. 18*, 79th Cong., 1st Sess. (1945).

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Bureau of Reclamation (Interior)	43 CFR §§419.0-1-.13
Coast Guard (Transportation)	33 CFR §§25.101-.409

Commerce	15 CFR §§2.1-.8
Defense Logistics Agency (Defense)	32 CFR §§1280.1-.5
Education	34 CFR §§35.1-.10
Energy	10 CFR §§1014.1-.11
Environmental Protection Agency	40 CFR §§10.1-.11
Federal Emergency Management Agency	44 CFR §§11.1-.19
Housing and Urban Development	24 CFR §§17.1-.12
Interior	43 CFR §§22.1-.5
Internal Revenue Service (Treasury)	26 CFR §§601.205
International Communication Agency	22 CFR §§511.1-.12
Labor	29 CFR §§15.1-.22
NASA	14 CFR §§1261.300-.315
National Credit Union Administration	12 CFR §§750.1-.10
National Gallery of Art	36 CFR §§503.1-.3
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Peace Corps	22 CFR §§304.1-.12
Postal Service	39 CFR §§912.1-.14
Small Business Administration	13 CFR §§114.100-.111
Smithsonian Institution	36 CFR §§530.1-.23
State	22 CFR §§31.1-.17
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U.S. Information Agency	22 CFR §§511.1-.12
Veterans Affairs	38 CFR §§14.600-.610

Appendix:

1. Federal Tort Claims Act, 28 U.S.C. §§1291, 1346, 1402, 2401, 2402, 2411, 2412, 2671-80 (1990).
2. Department of Justice, Administrative Claims under Federal Tort Claims Act regulations, 28 CFR §§14.1-.11 (1990).
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Federal Tort Claims Act

Title 28, U.S. Code

§1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.
(June 25, 1948, ch. 646, 62 Stat. 929; Oct. 31, 1951, ch. 655, §48, 65 Stat. 726; July 7, 1958, Pub. L. No. 85-508, §12(e), 72 Stat. 348; Apr. 2, 1982, Pub. L. No. 97-164, title I, §124, 96 Stat. 36.)

* * * *

§1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. or the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 6226, 6228(a), 7426, or 7428 (in the case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1986.

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

(June 25, 1948, ch. 646, 62 Stat. 933; Apr. 25, 1949, ch. 92, §2(a), 63 Stat. 62; May 24, 1949, ch. 139, §80(a), (b), 63 Stat. 101; Oct. 31, 1951, ch. 655, §50(b), 65 Stat. 727; July 30, 1954, ch. 648, §1, 68 Stat. 589; July 7, 1958, Pub. L. No. 85-508, §12(e), 72 Stat. 348; Aug. 30, 1964, Pub. L. No. 88-519, 78 Stat. 699; Nov. 2, 1966, Pub. L. No. 89-719, title II, §202(a), 80 Stat. 1148; July 23, 1970, Pub. L. No. 91-350, §1(a), 84 Stat. 449; Oct. 25, 1972, Pub. L. No. 92-562, §1, 86 Stat. 1176; Oct. 4, 1976, Pub. L. No. 94-455, title XII, §1204(c)(1), title XIII, §1306(b)(7), 90 Stat. 1697, 1719; Nov. 1, 1978, Pub. L. No. 95-563, §14(a), 92 Stat. 2389; Apr. 2, 1982, Pub. L. No. 97-164, title I, §129, 96 Stat. 39; Sept. 3, 1982, Pub. L. No. 97-248, title IV, §402(c)(17), 96 Stat. 669; Oct. 22, 1986, Pub. L. No. 99-514, §2, 100 Stat. 2095.)

* * * *

§1402. United States as defendant

(a) Any civil action in a district court against the United States under subsection (a) of section 1346 of this title may be prosecuted only:

(1) Except as provided in paragraph (2), in the judicial district where the plaintiff resides;

(2) In the case of a civil action by a corporation under paragraph (1) of subsection (a) of section 1346, in the judicial district in which is located the principal place of business or principal office or agency of the corporation; or if it has no principal place of business or principal office or agency in any judicial district (A) in the judicial district in which is located the office to which was made the return of the tax in respect of which the claim is made, or (B) if no return was made, in the judicial district in which lies the District of Columbia. Notwithstanding the foregoing provisions of this paragraph a district court, for the convenience of the parties and witnesses, in the interest of justice, may transfer any such action to any other district or division.

(b) Any civil action on a tort claim against the United States under subsection (b) of section 1346 of this title may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred.

(c) Any civil action against the United States under subsection (e) of section 1346 of this title may be prosecuted only in the judicial district where the property is situated at the time of levy, or if no levy is made, in the judicial district in which the event occurred which gave rise to the cause of action.

(d) Any civil action under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States shall be brought in the district court of the district where the property is located or, if located in different districts, in any of such districts.
(June 25, 1948, ch. 646, 62 Stat. 937; Sept. 2, 1958, Pub. L. No. 85-920, 72 Stat. 1770; Nov. 2, 1966, Pub. L. No. 89-719, title II, §202(b), 80 Stat. 1149; Oct. 25, 1972, Pub. L. No. 92-562, §2, 86 Stat. 1176; Apr. 2, 1982, Pub. L. No. 97-164, title I, §131, 96 Stat. 39.)

* * * *

§2401. Time for commencing action against United States

(a) Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.
(June 25, 1948, ch. 646, 62 Stat. 971; Apr. 25, 1949, ch. 92, §1, 63 Stat. 62; Sept. 8, 1959, Pub. L. No. 86-238, §1(3), 73 Stat. 472; July 18, 1966, Pub. L. No. 89-506, §7, 80 Stat. 307; Nov. 1, 1978, Pub. L. No. 95-563, §14(b), 92 Stat. 2389.)

§2402. Jury trial in actions against United States

Any action against the United States under section 1346 shall be tried by the court without a jury, except that any action against the United States under section 1346(a)(1) shall, at the request of either party to such action, be tried by the court with a jury.
(June 25, 1948, ch. 646, 62 Stat. 971; July 30, 1954, ch. 648, §2(a), 68 Stat. 589.)

§2411. Interest

In any judgment of any court rendered (whether against the United States, a collector or deputy collector of internal revenue, a former collector or deputy collector, or the personal representative in case of death) for any overpayment in respect of any internal-revenue tax, interest shall be allowed at the overpayment rate established under section 6621 of the Internal Revenue Code of 1986 upon the amount of the overpayment, from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue. The Commissioner is authorized to tender by check payment of any such judgment, with interest as herein provided, at any time after such judgment becomes final, whether or not a claim for such payment has been duly filed, and such tender shall stop the running of interest, whether or not such refund check is accepted by the judgment creditor.

(June 25, 1948, ch. 646, 62 Stat. 973; May 24, 1949, ch. 139, §120, 63 Stat. 106; Jan. 3, 1975, Pub. L. No. 93-625, §7(a)(2), 88 Stat. 2115; Apr. 2, 1982, Pub. L. No. 97-164, title III, §302(b), 96 Stat. 56; Oct. 22, 1986, Pub. L. No. 99-514, §2, title XV, §1511(c)(18), 100 Stat. 2095, 2746.)

§2412. Costs and fees

(a) Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the United States shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation.

(b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

(c)(1) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for costs pursuant to subsection (a) shall be paid as provided in sections 2414 and 2517 of this title and shall be in addition to any relief provided in the judgment.

(2) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for fees and expenses of attorneys pursuant to subsection (b) shall be paid as provided in sections 2414 and 2517 of this title, except that if the basis for the award is a finding that the United States acted in bad faith, then the award shall be paid by any agency found to have acted in bad faith and shall be in addition to any relief provided in the judgment.

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

(C) The court, in its discretion, may reduce the amount to be awarded pursuant to this subsection, or deny an award, to the extent that the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

(2) For the purposes of this subsection-

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.);

(B) "party" means (i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association;

(C) "United States" includes any agency and any official of the United States acting in his or her official capacity;

(D) "position of the United States" means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings;

(E) "civil action brought by or against the United States" includes an appeal by a party, other than the United States, from a decision of a contracting officer rendered pursuant to a disputes clause in a contract with the Government or pursuant to the Contract Disputes Act of 1978;

(F) "court" includes the United States Claims Court;

(G) "final judgment" means a judgment that is final and not appealable, and includes an order of settlement; and

(H) "prevailing party", in the case of eminent domain proceedings, means a party who obtains a final judgment (other than by settlement), exclusive of interest, the amount of which is at least as close to the highest valuation of the property involved that is attested to at trial on behalf of the property owner as it is to the highest valuation of the property involved that is attested to at trial on behalf of the Government.

(3) In awarding fees and other expenses under this subsection to a prevailing party in any action for judicial review of an adversary adjudication, as defined in subsection (b)(1)(C) of section 504 of title 5, United States Code, or an adversary adjudication subject to the Contract Disputes Act of 1978, the court shall include in that award fees and other expenses to the same extent authorized in subsection (a) of such section, unless the court finds that during such adversary adjudication the position of the United States was substantially justified, or that special circumstances make an award unjust.

(4) Fees and other expenses awarded under this subsection to a party shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise.

(5) The Director of the Administrative Office of the United States Courts shall include in the annual report prepared pursuant to section 604 of this title, the amount of fees and other expenses awarded during the preceding fiscal year pursuant to this subsection. The report shall describe the number, nature, and amount of the awards, the claims involved in the controversy, and any other relevant information which may aid the Congress in evaluating the scope and impact of such awards.

(e) The provisions of this section shall not apply to any costs, fees, and other expenses in connection with any proceeding to which section 7430 of the Internal Revenue Code of 1986 applies (determined without regard to subsections (b) and (f) of such section). Nothing in the preceding sentence shall prevent the awarding under subsection (a) of section 2412 of title 28, United States Code, of costs enumerated in section 1920 of such title (as in effect on October 1, 1981).

(f) If the United States appeals an award of costs or fees and other expenses made against the United States under this section and the award is affirmed in whole or in part, interest shall be paid on the amount of the award as affirmed. Such interest shall be computed at the rate determined under section 1961(a) of this title, and shall run from the date of the award through the day before the date of the mandate of affirmance.

(June 25, 1948, ch. 646, 62 Stat. 973; July 18, 1966, Pub. L. No. 89-507, §1, 80 Stat. 308; Oct. 21, 1980, Pub. L. No. 96-481, title II, §204(a), (c), 94 Stat. 2327, 2329; Sept. 3, 1982, Pub. L. No. 97-248, title II, §292(c), 96 Stat. 574; Aug. 5, 1985, Pub. L. No. 99-80, §§2, 6, 99 Stat. 184, 186; Oct. 22, 1986, Pub. L. No. 99-514, §2, 100 Stat. 2095.)

Chapter 171–Tort Claims Procedures

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§2671. Definitions

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.

(June 25, 1948, ch. 646, 62 Stat. 982; May 24, 1949, ch. 139, §124, 63 Stat. 106; July 18, 1966, Pub. L. No. 89-506, §8, 80 Stat. 307; Dec. 29, 1981, Pub. L. No. 97-124, §1, 95 Stat. 1666; Nov. 18, 1988, Pub. L. No. 100-694, §3, 102 Stat. 4564.)

§2672. Administrative adjustment of claims

The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred: Provided , That any award, compromise, or settlement in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee. Notwithstanding the proviso contained in the preceding sentence, any award, compromise, or settlement may be effected without the prior written approval of the Attorney General or his or her designee, to the extent that the Attorney General delegates to the head of the agency the authority to make such award, compromise, or settlement. Such delegations may not exceed the authority delegated by the Attorney General to the United States attorneys to settle claims for money damages against the United States. Each Federal agency may use arbitration, or other alternative means of dispute resolution under the provisions of subchapter IV of chapter 5 of title 5, to settle any tort claim against the United States, to the extent of the agency's authority to award, compromise, or settle such claim without the prior written approval of the Attorney General or his or her designee.

Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, settlement, or determination shall be final and conclusive on all offices of the Government, except when procured by means of fraud.

Any award, compromise, or settlement in an amount of $2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency. Payment of any award, compromise, or settlement in an amount in excess of $2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title shall be paid in a manner similar to judgments and compromises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter.

The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.
(June 25, 1948, ch. 646, 62 Stat. 983; Apr. 25, 1949, ch. 92, §2(b), 63 Stat. 62; May 24, 1949, ch. 139, §125, 63 Stat. 106; Sept. 23, 1950, ch. 1010, §9, 64 Stat. 987; Sept. 8, 1959, Pub. L. No. 86-238, §1(1), 73 Stat. 471; July 18, 1966, Pub. L. No. 89-506, §§1, 9(a), 80 Stat. 306, 308; Nov. 15, 1990, Pub. L. No. 101-552, §8(a), 104 Stat. 2746.)

§2673. Reports to Congress

The head of each federal agency shall report annually to Congress all claims paid by it under section 2672 of this title, stating the name of each claimant, the amount claimed, the amount awarded, and a brief description of the claim.
(June 25, 1948, ch. 646, 62 Stat. 983.)

§2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.
(June 25, 1948, ch. 646, 62 Stat. 983; Nov. 18, 1988, Pub. L. No. 100-694, §§4, 9(c), 102 Stat. 4564, 4567.)

§2675. Disposition by federal agency as prerequisite; evidence

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time or presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.
(June 25, 1948, ch. 646, 62 Stat. 983; May 24, 1949, ch. 139, §126, 63 Stat. 107; July 18, 1966, Pub. L. No. 89-506, §2, 80 Stat. 306.)

§2676. Judgment as bar

The judgment in an action under section 1346 (b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.
(June 25, 1948, ch. 646, 62 Stat. 984.)

§2677. Compromise

The Attorney General or his designee may arbitrate, compromise, or settle any claim cognizable under section 1346(b) of this title, after the commencement of an action thereon.
(June 25, 1948, ch. 646, 62 Stat. 984; July 18, 1966, Pub. L. No. 89-506, §3, 80 Stat. 307.)

§2678. Attorney fees; penalty

No attorney shall charge, demand, receive, or collect for services rendered, fees in excess of 25 per centum of any judgment rendered pursuant to section 1346(b) of this title or any settlement made pursuant to section 2677 of this title, or in excess of 20 per centum of any award, compromise, or settlement made pursuant to section 2672 of this title.

Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this section, if recovery be had, shall be fined not more than $2,000 or imprisoned not more than one year, or both.
(June 25, 1948, ch. 646, 62 Stat. 984; July 18, 1966, Pub. L. No. 89-506, §4, 80 Stat. 307.)

§2679. Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred. .

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government-

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States

filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if-

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

(June 25, 1948, ch. 646, 62 Stat. 984; Sept. 21, 1961, Pub. L. No. 87-258, §1, 75 Stat. 539; July 18, 1966, Pub. L. No. 89-506, §5(a), 80 Stat. 307; Nov. 18, 1988, Pub. L. No. 100-694, §§5, 6, 102 Stat. 4564.)

AMENDMENTS

1988-Subsec. (b). Pub. L. No. 100-694, §5, amended subsec. (b) generally. Prior to amendment, subsec. (b) read as follows: "The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property or personal injury or death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim."

Subsec. (d). Pub. L. No. 100-694, §6, amended subsec. (d) generally. Prior to amendment, subsec. (d) read as follows: "Upon a certification by the Attorney General that the defendant employee was acting within the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and the proceedings deemed a tort action brought against the United States under the provisions of this title and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States, the case shall be remanded to the State court."

1966-Subsec. (b). Pub. L. No. 89-506 inserted reference to section 2672 of this title and substituted "remedy" for "remedy by suit".

1961-Pub. L. No. 87-258 designated existing provisions as subsec. (a) and added subsecs. (b) to (e).

Effective Date of 1988 Amendment

Section 8 of Pub. L. No. 100-694 provided that:

"(a) General Rule.-This Act and the amendments made by this Act [enacting section 831c-2 of Title 16, Conservation, amending this section and sections 2671 and 2674 of this title, and enacting provisions set out as notes under this section and section 2671 of this title] shall take effect on the date of the enactment of this Act [Nov. 18, 1988].

"(b) Applicability to Proceedings.-The amendments made by this Act [amending this section and sections 2671 and 2674 of this title] shall apply to all claims, civil actions, and proceedings pending on, or filed on or after, the date of the enactment of this Act.

"(c) Pending State Proceedings.-With respect to any civil action or proceeding pending in a State court to which the amendments made by this Act apply, and as to which the period for removal under section 2679(d) of title 28, United States Code (as amended by section 6 of this Act), has expired, the Attorney General shall have 60 days after the date of the enactment of this Act during which to seek removal under such section 2679(d).

"(d) Claims Accruing Before Enactment.-With respect to any civil action or proceeding to which the amendments made by this Act apply in which the claim accrued before the date of the enactment of this Act, the period during which the claim shall be deemed to be timely presented under section 2679(d)(5) of title 28, United States Code (as amended by section 6 of this Act) shall be that period within which the claim could have been timely filed under applicable State law, but in no event shall such period exceed two years from the date of the enactment of this Act.

§2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to-

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

[(g) Repealed. Sept. 26, 1950, ch. 1049, §13 (5), 64 Stat. 1043.]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States

Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

(June 25, 1948, ch. 646, 62 Stat. 984; July 16, 1949, ch. 340, 63 Stat. 444; Sept. 26, 1950, ch. 1049, §§2(a)(2), 13(5), 64 Stat. 1038, 1043; Aug. 18, 1959, Pub. L. No. 86-168, title II, §202(b), 73 Stat. 389; Mar. 16, 1974, Pub. L. No. 93-253, §2, 88 Stat. 50.)

Department of Justice

Administrative Claims under Federal Tort Claims Act regulations, 28 CFR §14.1-.11 (1990)

PART 14—ADMINISTRATIVE CLAIMS UNDER FEDERAL TORT CLAIMS ACT

Sec.

14.1 Scope of regulations.
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APPENDIX TO PART 14—REDELEGATION OF AUTHORITY TO THE ADMINISTRATOR OF VETERANS AFFAIRS.

AUTHORITY: 5 U.S.C. 301; 28 U.S.C. 509, 510, 2672; 38 U.S.C. 223(a).

SOURCE: Order No. 371-66, 31 FR 16616, Dec. 29, 1966, unless otherwise noted.

§ 14.1 Scope of regulations.

These regulations shall apply only to claims asserted under the Federal Tort Claims Act. The terms "Federal agency" and "agency", as used in this part, include the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States but do not include any contractor with the United States.

[Order No. 960-81, 46 FR 52355, Oct. 27, 1981]

§ 14.2 Administrative claim; when presented.

(a) For purposes of the provisions of 28 U.S.C. 2401(b), 2672, and 2675, a claim shall be deemed to have been presented when a Federal agency receives from a claimant, his duly authorized agent or legal representative, an executed Standard Form 95 or other written notification of an incident, accompanied by a claim for money damages in a sum certain for injury to or loss of property, personal injury, or death alleged to have occurred by reason of the incident; and the title or legal capacity of the person signing, and is accompanied by evidence of his authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian, or other representative.

(b)(1) A claim shall be presented to the Federal agency whose activities gave rise to the claim. When a claim is presented to any other Federal agency, that agency shall transfer it forthwith to the appropriate agency, if the proper agency can be identified from the claim, and advise the claimant of the transfer. If transfer is not feasible the claim shall be returned to the claimant. The fact of transfer shall not, in itself, preclude further transfer, return of the claim to the claimant or other appropriate disposition of the claim. A claim shall be presented as required by 28 U.S.C. 2401(b) as of the date it is received by the appropriate agency.

(2) When more than one Federal agency is or may be involved in the events giving rise to the claim, an agency with which the claim is filed shall contact all other affected agencies in order to designate the single agency which will thereafter investigate and decide the merits of the claim. In the event that an agreed upon designation cannot be made by the affected agencies, the Department of Justice shall be consulted and will thereafter designate an agency to investigate and decide the merits of the claim. Once a determination has been made, the designated agency shall notify the claimant that all future correspondence concerning the claim shall be directed to that Federal agency. All involved Federal agencies may agree either to conduct their own administrative reviews and to coordinate the results or to have the investigations conducted by the designated Federal agency, but, in either event, the designated Federal agency will be responsible for the final determination of the claim.

(3) A claimant presenting a claim arising from an incident to more than one agency should identify each agency to which the claim is submitted at the time each claim is presented. Where a claim arising from an incident is presented to more than one Federal agency without any indication that more than one agency is involved, and any one of the concerned Federal agencies takes final action on that claim, the final action thus taken is conclusive on the claims presented to the other agencies in regard to the time required for filing suit set forth in 28 U.S.C. 2401(b). However, if a second involved Federal agency subsequently desires to take further action with a view towards settling the claim the second Federal agency may treat the matter as a request for reconsideration of the final denial under 28 CFR 14.9(b), unless suit has been filed in the interim, and so advise the claimant.

(4) If, after an agency final denial, the claimant files a claim arising out of the same incident with a different Federal agency, the new submission of

the claim will not toll the requirement of 28 U.S.C. 2401(b) that suit must be filed within six months of the final denial by the first agency, unless the second agency specifically and explicitly treats the second submission as a request for reconsideration under 28 CFR 14.9(b) and so advises the claimant.

(c) A claim presented in compliance with paragraph (a) of this section may be amended by the claimant at any time prior to final agency action or prior to the exercise of the claimant's option under 28 U.S.C. 2675(a). Amendments shall be submitted in writing and signed by the claimant or his duly authorized agent or legal representative. Upon the timely filing of an amendment to a pending claim, the agency shall have six months in which to make a final disposition of the claim as amended and the claimant's option under 28 U.S.C. 2675(a) shall not accrue until six months after the filing of an amendment.

[Order No. 870-79, 45 FR 2650, Jan. 14, 1980, as amended by Order No. 960-81, 46 FR 52355, Oct. 27, 1981; Order No. 1179-87, 52 FR 7411, Mar. 11, 1987]

§ 14.3 Administrative claim; who may file.

(a) A claim for injury to or loss of property may be presented by the owner of the property, his duly authorized agent or legal representative.

(b) A claim for personal injury may be presented by the injured person, his duly authorized agent, or legal representative.

(c) A claim based on death may be presented by the executor or administrator of the decendent's estate, or by any other person legally entitled to assert such a claim in accordance with applicable State law.

(d) A claim for loss wholly compensated by an insurer with the rights of a subrogee may be presented by the insurer. A claim for loss partially compensated by an insurer with the rights of a subrogee may be presented by the parties individually as their respective interests appear, or jointly.

[Order No. 371-66, 31 FR 16616, Dec. 29, 1966, as amended by Order No. 1179-87, 52 FR 7412, Mar. 11, 1987]

§ 14.4 Administrative claims; evidence and information to be submitted.

(a) *Death.* In support of a claim based on death, the claimant may be required to submit the following evidence or information:

(1) An authenticated death certificate or other competent evidence showing cause of death, date of death, and age of the decedent.

(2) Decedent's employment or occupation at time of death, including his monthly or yearly salary or earnings (if any), and the duration of his last employment or occupation.

(3) Full names, addresses, birth dates, kinship, and marital status of the decedent's survivors, including identification of those survivors who were dependent for support upon the decedent at the time of his death.

(4) Degree of support afforded by the decedent to each survivor dependent upon him for support at the time of his death.

(5) Decedent's general physical and mental condition before death.

(6) Itemized bills for medical and burial expenses incurred by reason of the incident causing death, or itemized receipts of payment for such expenses.

(7) If damages for pain and suffering prior to death are claimed, a physician's detailed statement specifying the injuries suffered, duration of pain and suffering, any drugs administered for pain, and the decedent's physical condition in the interval between injury and death.

(8) Any other evidence or information which may have a bearing on either the responsibility of the United States for the death or the damages claimed.

(b) *Personal injury.* In support of a claim for personal injury, including pain and suffering, the claimant may be required to submit the following evidence or information:

(1) A written report by his attending physician or dentist setting forth the nature and extent of the injury, nature and extent of treatment, any degree of temporary or permanent disability, the prognosis, period of hospitalization, and any diminished earning capacity. In addition, the claimant may be required to submit to a physi-

cal or mental examination by a physician employed by the agency or another Federal agency. A copy of the report of the examining physician shall be made available to the claimant upon the claimant's written request provided that he has, upon request, furnished the report referred to in the first sentence of this paragraph and has made or agrees to make available to the agency any other physician's reports previously or thereafter made of the physical or mental condition which is the subject matter of his claim.

(2) Itemized bills for medical, dental, and hospital expenses incurred, or itemized receipts of payment for such expenses.

(3) If the prognosis reveals the necessity for future treatment, a statement of expected expenses for such treatment.

(4) If a claim is made for loss of time from employment, a written statement from his employer showing actual time lost from employment, whether he is a full or part-time employee, and wages or salary actually lost.

(5) If a claim is made for loss of income and the claimant is self-employed, documentary evidence showing the amounts of earnings actually lost.

(6) Any other evidence or information which may have a bearing on either the responsibility of the United States for the personal injury or the damages claimed.

(c) *Property damage.* In support of a claim for injury to or loss of property, real or personal, the claimant may be required to submit the following evidence or information:

(1) Proof of ownership.

(2) A detailed statement of the amount claimed with respect to each item of property.

(3) An itemized receipt of payment for necessary repairs or itemized written estimates of the cost of such repairs.

(4) A statement listing date of purchase, purchase price and salvage value, where repair is not economical.

(5) Any other evidence or information which may have a bearing on either the responsibility of the United States for the injury to or loss of property or the damages claimed.

§ 14.5 Review by legal officers.

The authority to adjust, determine, compromise, and settle a claim under the provisions of section 2672 of Title 28, United States Code, shall, if the amount of a proposed compromise, settlement, or award exceeds $5,000, be exercised by the head of an agency or his designee only after review by a legal officer of the agency.

[Order No. 371-66, 31 FR 16616, Dec. 29, 1966, as amended by Order No. 757-77, 42 FR 62001, Dec. 8, 1977; Order No. 960-81, 46 FR 52355, Oct. 27, 1981]

§ 14.6 See Administrative Claims Regulation Appendix on page 629.

§ 14.7 Removed.

§ 14.8 Investigation and examination.

A Federal agency may request any other Federal agency to investigate a claim filed under section 2672, title 28, U.S. Code, or to conduct a physical examination of a claimant and provide a report of the physical examination. Compliance with such requests may be conditioned by a Federal agency upon reimbursement by the requesting agency of the expense of investigation or examination where reimbursement is authorized, as well as where it is required, by statute or regulation.

§ 14.9 Final denial of claim.

(a) Final denial of an administrative claim shall be in writing and sent to the claimant, his attorney, or legal representative by certified or registered mail. The notification of final denial may include a statement of the reasons for the denial and shall include a statement that, if the claimant is dissatisfied with the agency action, he may file suit in an appropriate U.S. District Court not later than 6 months after the date of mailing of the notification.

(b) Prior to the commencement of suit and prior to the expiration of the 6-month period provided in 28 U.S.C. 2401(b), a claimant, his duly authorized agent, or legal representative, may file a written request with the agency for reconsideration of a final denial of a claim under paragraph (a) of this section. Upon the timely filing of a request for reconsideration the agency shall have 6 months from the date of filing in which to make a final disposition of the claim and the claimant's option under 28 U.S.C. 2675(a) shall not accrue until 6 months after the filing of a request for reconsideration. Final agency action on a request for reconsideration shall be effected in accordance with the provisions of paragraph (a) of this section.

[Order No. 371-66, 31 FR 16616, Dec. 29, 1966, as amended by Order No. 422-69, 35 FR 315, Jan. 8, 1970]

§ 14.10 Action on approved claims.

See Administrative Claims Regulation Appendix on page 629 for revised §14.10(a).

(b) Acceptance by the claimant, his agent, or legal representative, of any award, compromise or settlement made pursuant to the provisions of section 2672 or 2677 of Title 28, United States Code, shall be final and conclusive on the claimant, his agent or legal representative and any other person on whose behalf or for whose benefit the claim has been presented, and shall constitute a complete release of any claim against the United States and against any employee of the Government whose act or omission gave rise to the claim, by reason of the same subject matter.

[Order No. 371-66, 31 FR 16616, Dec. 29, 1966, as amended by Order No. 834-79, 44 FR 33399, June 11, 1979]

§ 14.11 Supplementing regulations.

Each agency is authorized to issue regulations and establish procedures consistent with the regulations in this part.

APPENDIX TO PART 14—REDELEGATION OF AUTHORITY TO THE ADMINISTRATOR OF VETERANS AFFAIRS

SECTION 1. AUTHORITY TO COMPROMISE TORT CLAIMS

(a) The Administrator of Veterans Affairs shall have the authority to adjust, determine, compromise and settle a claim involving the Veterans Administration, under Section 2672 of Title 28, United States Code or Section 4116 of Title 38, United States Code, relating to the administrative settlement of federal tort claims, if the amount of the proposed adjustment, compromise, or award does not exceed $100,000. When the Administrator believes a claim pending before him presents a novel question of law or of policy, he shall obtain the advice of the Assistant Attorney General in charge of the Civil Division.

(b) The Administrator may redelegate in writing the settlement authority delegated to him under this section.

SECTION 2. MEMORANDUM

Whenever the Administrator settles any administrative claim pursuant to the authority granted by section 1 for an amount in excess of $50,000 and within the amount delegated to him under section 1, a memorandum fully explaining the basis for the action taken shall be executed. A copy of this memorandum shall be sent to the Director, FTCA Staff, Torts Branch of the Civil Division.

[Order No. 1302-88, 53 FR 37753, Sept. 28, 1988]

Department of Justice

Alternative Dispute Resolution under the Federal Tort Claims Act, 28 CFR §14.6, 57 Fed. Reg. 21, 738 (May 22, 1992)

DEPARTMENT OF JUSTICE

28 CFR Part 14

[AG Order No. 1591-92]

Alternative Dispute Resolution Under the Federal Tort Claims Act

AGENCY: Department of Justice.

ACTION: Final rule.

SUMMARY: This Order revises § 14.6 of part 14, title 28 of the Code of Federal Regulations to provide guidance to agencies and to inform the public of the rules applicable to agency use of alternative dispute resolution techniques in the course of consideration and resolution of administrative claims under the Federal Tort Claims Act. The regulations are adopted to foster appropriate use by agencies of alternative dispute resolution and to implement recent amendments to 28 U.S.C. 2672. The Order does not restrict the authority of the Attorney General over the litigation of claims.

EFFECTIVE DATE: May 22, 1992.

FOR FURTHER INFORMATION CONTACT: Jeffrey Axelrad, Director, Torts Branch, Civil Division, U.S. Department of Justice, Washington, DC 20530, (202) 501-7075.

SUPPLEMENTARY INFORMATION: This Order defines and clarifies agency settlement authority under the Federal Tort Claims Act ("FTCA"). Section 2672 of title 28, United States Code, as amended by section 8(a) of the Administrative Dispute Resolution Act ("ADR Act"), Public Law No. 101-552, 104 Stat. 2746 (1990), authorizes the Attorney General to approve any award, compromise, or settlement in excess of $25,000 of an administrative claim filed pursuant to the Federal Tort Claims Act ("FTCA"); to delegate to the head of an agency authority to make an award, compromise, or settlement under the FTCA, not to exceed the authority delegated by the Attorney General to the United States Attorneys to settle claims for money damages against the United States; and, to prescribe regulations for the administrative adjustment of claims under the FTCA.

This final rule revises 28 CFR 14.6 to clarify the procedures for use of alternative dispute resolution as a means to dispose of claims filed under the FTCA, to set forth procedures and policies pertaining to the delegation of settlement authority in excess of $25,000, to incorporate the recent amendments to 28 U.S.C. 2672 that were made by section 8(a) of the ADR Act, and to improve the clarity of § 14.6.

Paragraphs (a) and (b) of § 14.6 are new and provide agency guidance regarding alternative methods of dispute resolution. Paragraphs (c) and (d) are similar to paragraphs (a) through (c) of the prior version of § 14.6. Paragraph (e) is similar to, and replaces, prior § 14.7. As a result, § 14.7 has been removed and reserved. Also, § 14.10(a) has been revised to reflect the increased authority of the Attorney General under the ADR Act.

This Order is a statement of Department policy and a rule of agency procedure and practice. Consequently, an opportunity to comment is not required prior to the effective date, pursuant to 5 U.S.C. 553(b). In accordance with 5 U.S.C. 605(b), the Attorney General certifies that this rule does not have a significant adverse economic impact on a substantial number of small entities. This rule is not a major rule within the meaning of section 1(b) of Executive Order No. 12291, nor does it have Federalism implications warranting the preparation of a Federalism Assessment in accordance with section 6 of Executive Order No. 12612.

List of Subjects in 28 CFR Part 14

Authority delegations (Government agencies), Claims.

By virtue of the authority vested in me as Attorney General by 28 U.S.C. 509 and 510, 5 U.S.C. 301, and 38 U.S.C. 224(a), part 14 of title 28 of the Code of Federal Regulations is amended as follows:

PART 14—ADMINISTRATIVE CLAIMS UNDER FEDERAL TORT CLAIMS ACT

1. The authority citation for part 14 is revised to read as follows:

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510, 2672; 38 U.S.C. 224(a).

2. Section 14.6 is revised to read as follows:

§ 14.6 Dispute resolution techniques and limitations on agency authority.

(a) *Guidance Regarding Dispute Resolution.* The administrative process established pursuant to 28 U.S.C. 2672 and this part 14 is intended to serve as an efficient effective forum for rapidly resolving tort claims with low costs to all participants. This guidance is provided to agencies to improve their use of this administrative process and to maximize the benefit achieved through application of prompt, fair, and efficient techniques that achieve an informal resolution of administrative tort claims without burdening claimants or the agency. This section provides guidance to agencies only and does not create or establish any right to enforce any provision of this part on behalf of any claimant against the United States, its agencies, its officers, or any other person. This section also does not require any agency to use any dispute resolution technique or process.

(1) Whenever feasible, administrative claims should be resolved through informal discussions, negotiations, and settlements rather than through the use of any formal or structured process. At the same time, agency personnel processing administrative tort claims should be trained in dispute resolution techniques and skills that can contribute to the prompt, fair, and efficient resolution of administrative claims.

(2) An agency may resolve disputed factual questions regarding claims against the United States under the FTCA, including 28 U.S.C. 2671–2680, through the use of any alternative dispute resolution technique or process if the agency specifically agrees to employ the technique or process, and reserves to itself the discretion to accept or reject the determinations made through the use of such technique or process.

(3) Alternative dispute resolution techniques or processes should not be adopted arbitrarily but rather should be based upon a determination that use of a particular technique is warranted in the context of a particular claim or claims, and that such use will materially contribute to the prompt, fair, and efficient resolution of the claims. If alternative dispute resolution techniques will not materially contribute to the prompt, fair, and efficient resolution of claims, the dispute resolution processes otherwise used pursuant to these regulations shall be the preferred means of seeking resolution of such claims.

(b) *Alternative Dispute Resolution.*

(1) *Case-by-case.* In order to use, and before using, any alternative dispute resolution technique or process to facilitate the prompt resolution of disputes that are in excess of the agency's delegated authority, an agency may use the following procedure to obtain written approval from the Attorney General, or his or her designee, to compromise a claim or series of related claims.

(i) A request for settlement authority under paragraph (b)(1) of this section shall be directed to the Director, Torts Branch, Civil Division, Department of Justice, ("Director") and shall contain information justifying the request, including:

(A) The basis for concluding that liability exists under the FTCA;

(B) A description of the proposed alternative dispute resolution technique or process and a statement regarding why this proposed form of alternative dispute resolution is suitable for the claim or claims;

(C) A statement reflecting the

claimant's or claimants' consent to use of the proposed form of alternative dispute resolution, indicating the proportion of any additional cost to the United States from use of the proposed alternative dispute resolution technique or process that shall be borne by the claimant or claimants, and specifying the manner and timing of payment of that proportion to be borne by the claimant or claimants;

(D) A statement of how the requested action would facilitate use of an alternative dispute resolution technique or process;

(E) An explanation of the extent to which the decision rendered in the alternative dispute resolution proceeding would be made binding upon claimants; and,

(F) An estimate of the potential range of possible settlements resulting from use of the proposed alternative dispute resolution technique.

(ii) The Director shall forward a request for expedited settlement action under paragraph (b)(1)(i) of this section, along with the Director's recommendation as to what action should be taken, to the Department of Justice official who has authority to authorize settlement of the claim or related claims. If that official approves the request, a written authorization shall be promptly forwarded to the requesting agency.

(2) *Delegation of Authority.* Pursuant to, and within the limits of, 28 U.S.C. 2672, the head of an agency or his or her designee may request delegations of authority to make any award, compromise, or settlement without the prior written approval of the Attorney General or his or her designee in excess of the agency's authority. In considering whether to delegate authority pursuant to 28 U.S.C. 2672 in excess of previous authority conferred upon the agency, consideration shall be given to:

(i) The extent to which the agency has established an office whose responsibilities expressly include the administrative resolution of claims presented pursuant to the Federal Tort Claims Act;

(ii) The agency's experience with the resolution of administrative claims presented pursuant to 28 U.S.C. 2672;

(iii) The Department of Justice's experiences with regard to administrative resolution of tort claims arising out of the agency's activities.

(c) *Monetary authority.* An award, compromise, or settlement of a claim by an agency under 28 U.S.C. 2672, in excess of $25,000 or in excess of the authority delegated to the agency by the Attorney General pursuant to 28 U.S.C. 2672, whichever is greater, shall be effected only with the prior written approval of the Attorney General or his or her designee. For purposes of this paragraph, a principal claim and any derivative or subrogated claim shall be treated as a single claim.

(d) *Limitations on settlement authority.*

(1) *Policy.* An administrative claim may be adjusted, determined, compromised, or settled by an agency under 28 U.S.C. 2672 only after consultation with the Department of Justice when, in the opinion of the agency:

(i) A new precedent or a new point of law is involved; or

(ii) A question of policy is or may be involved; or

(iii) The United States is or may be entitled to indemnity or contribution from a third party and the agency is unable to adjust the third party claim; or

(iv) The compromise of a particular claim, as a practical matter, will or may control the disposition of a related claim in which the amount to be paid may exceed $25,000 or may exceed the authority delegated to the agency by the Attorney General pursuant to 28 U.S.C. 2672, whichever is greater.

(2) *Litigation arising from the same incident.* An administrative claim may be adjusted, determined, compromised, or settled by an agency under 28 U.S.C. 2672 only after consultation with the Department of Justice when the agency is informed or is otherwise aware that the United States or an employee, agent, or cost-plus contractor of the United States is involved in litigation based on a claim arising out of the same incident or transaction.

(e) *Procedure.* When Department of Justice approval or consultation is required, or the advice of the Department of Justice is otherwise to be requested, under this section, the written referral or request of the Federal agency shall be directed to the Director at any time after presentment of a claim to the Federal agency, and shall contain:

(1) A short and concise statement of the facts and of the reasons for the referral or request;

(2) Copies of relevant portions of the agency's claim file; and

(3) A statement of the recommendations or views of the agency.

§ 14.7 [Reserved]

3. Section 14.7 is removed and reserved.

4. Section 14.10 is amended by revising paragraph (a) to read as follows:

§ 14.10 Action on approved claims.

(a) Any award, compromise, or settlement in an amount of $2,500 or less made pursuant to 28 U.S.C. 2672 shall be paid by the head of the Federal agency concerned out of the appropriations available to that agency. Payment of an award, compromise, or settlement in excess of $2,500 shall be obtained by the agency by forwarding Standard Form 1145 to the Claims Division, General Accounting Office. When an award is in excess of $25,000, or in excess of the authority delegated to the agency by the Attorney General pursuant to 28 U.S.C. 2672, whichever is greater, Standard Form 1145 must be accompanied by evidence that the award, compromise, or settlement has been approved by the Attorney General or his designee. When the use of Standard Form 1145 is required, it shall be executed by the claimant, or it shall be accompanied by either a claims settlement agreement or a Standard Form 95 executed by the claimant. When a claimant is represented by an attorney, the voucher for payment shall designate both the claimant and his attorney as payees; the check shall be delivered to the attorney, whose address shall appear on the voucher.

* * * * *

Dated: May 15, 1992.

William P. Barr,

Attorney General.

[FR Doc. 92-12015 Filed 5-21-92; 8:45 am]

BILLING CODE 4410-01-M

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Freedom of Information Act

Citations:

5 U.S.C. §552; enacted September 6, 1966, by Pub. L. No. 89-554, 80 Stat. 383; amended by Pub. L. No. 90-23, §1, June 5, 1967, 81 Stat. 54; Pub. L. No. 93-502, §§1-3, November 21, 1974, 88 Stat. 1561-1564; Pub. L. No. 94-409, §5(b), September 13, 1976, 90 Stat. 1247; Pub. L. No. 95-454, title IX, §906(a)(10), October 13, 1978, 92 Stat. 1225; Pub. L. No. 98-620, title IV, §402(2), November 8, 1984, 98 Stat. 3357; and Pub. L. No. 99-570, title I, §§1801-04, October 27, 1986, 100 Stat. 3207-48-50.

Lead Agency:

Department of Justice, Office of Information and Privacy, 10th and Constitution Avenue NW, Room 7238, Washington, DC 20530 (202) 514-3642.

Overview:

The Freedom of Information Act requires all agencies (1) to publish certain items of information in the Federal Register, (2) to make available for public inspection and copying certain other items of information, and (3) to make available certain information to any members of the public upon specific request for that information.

Federal Register Publication. Each agency is required (5 U.S.C. §552(a)(1)) to publish in the Federal Register:

- Descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

- Statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

- Rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

- Substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency;

- Each amendment, revision, or repeal of the foregoing.

If any listed item is not so published, persons without actual and timely notice of the substance of the items may not be required to conform their behavior to, or be adversely affected by, the item.

Opinions, Orders, Interpretations, Manuals. Adjudicative orders and opinions, statements of policy and interpretations not published in the Federal Register, and staff manuals and instructions to staff must either be made available for inspection and copying or be promptly published and made available for sale (5 U.S.C. §552(a)(2)). An agency may, with a full written explanation, delete identifying items that would constitute a clear invasion of personal privacy. Agencies must publish and maintain indexes of these orders, opinions, and other materials.

Requests for Other Records. All other agency records must promptly be made available upon a request that reasonably describes the records and is made in accordance with published procedures (5 U.S.C. §552(a)(3)-(4)(A)). To constitute an "agency record," a document must be either created or obtained by an agency and under agency control at the time of the request. See *Department of Justice v. Tax Analysts*, 492 U.S. 136, 144-45

(1989); see also *Wolfe v. HHS*, 711 F.2d 1077, 1079-82 (D.C. Cir. 1983).

A FOIA request must "reasonably describe" the records sought. A description of a requested agency document is sufficient if it enables a professional agency employee familiar with the subject area to locate the record with a reasonable amount of effort (H.R. Rep. No. 876, 93d Cong., 2d Sess. 6 (1974)). Requests must be made in accordance with the agency's published rules regarding the time, place and fees for filing and procedures to be followed. 5 U.S.C. §552(a)(3).

Time Limits. An agency must inform a FOIA requester within 10 working days after receipt of the request of the agency's intent to comply with or deny the request (5 U.S.C. §552(a)(6)(i)). The requester may appeal a denial to the agency head. The agency head must decide appeals within 20 working days (5 U.S.C. §552(a)(6)(i)). Either time limit may be extended for 10 working days in unusual circumstances upon written notice to the requester. The circumstances permitting the extension of the time limits are specified in the FOIA (§552(a)(6)(B)). See also judicial review discussion, below.

Fees and Fee Waivers. As amended by the FOIA Reform Act of 1986, the FOIA sets forth three levels of fees that may be assessed for FOIA requests, depending on the category of requester:

> (1) An agency may charge a requester for document search time, duplication and review costs if the request is made for a "commercial use." 5 U.S.C. §552(a)(4)(A)(ii)(I).
>
> (2) An agency may only charge a requester for document duplication if the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research, or by a representative of the news media, *provided that* the records are not sought for a commercial use. 5 U.S.C. §552(a)(4)(A)(ii)(II).
>
> (3) An agency may charge requesters not covered by categories (1) and (2) above for document search and duplication.

These three categories of fees are further modified by several general limitations that were included in the FOIA by the 1986 amendments. These limitations, which appear to have originated in a 1981 Conference recommendation (*Procedures for Assessing and Collecting Freedom of Information Act Fees*, 1 CFR §305.81-1), are: (1) no fee may be charged if the costs of collecting and processing the fee are likely to equal or exceed the amount of the fee; (2) a noncommercial requester may not be charged for the first 2 hours of search time or the first 100 pages of document duplication; (3) no agency may require advance payment of fees unless the requester has previously failed to pay a fee in a timely fashion or the agency has determined that the fee will exceed $250; and (4) review costs may not be charged for review related to appeals or the resolution of issues of law or policy raised by the request. 5 U.S.C. §552(a)(4)(A)(iv), (v).

The FOIA Reform Act also directed the Office of Management and Budget to develop guidelines, following notice-and-comment procedure, to provide a "uniform schedule of fees for all agencies," and each federal agency was directed to promulgate regulations conforming to those guidelines, 5 U.S.C. §552(a)(4)(A)(i). OMB published its guidelines on March 27, 1987 (52 Fed. Reg. 10,012).

Before passage of the FOIA Reform Act, the FOIA provided simply that an agency could waive or reduce document search and duplication fees when it would be "in the public interest because furnishing the information can be considered as primarily benefiting the general public." 5 U.S.C. §552(a)(4)(A) (1982). The FOIA Reform Act amended the fee waiver provision to state that "[d]ocuments shall be furnished without any charge or at a [reduced] charge . . . if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." §552(a)(4)(A)(iii).

The Department of Justice issued a new fee waiver policy in April 1987 to supersede previous policy guidance in this area (Memorandum, Stephen J. Markman, Assistant Attorney General, Office of Legal Policy, to Agency Heads, April 2, 1987). The new guidance was intended for use by agencies adopting new fee waiver regulations. The memorandum includes a six-factor test for deciding to grant or deny a request for waiver or reduction of FOIA fees (see discussion in the Justice Department's *Freedom of Information Case List* (1991 ed.) at 599-608.

Exemptions. Nine categories of records (or portions of records) are exempt under 5 U.S.C. §552(b) from mandatory disclosure under the FOIA:

> *(1) Records that are specifically authorized under criteria established by an executive order to be kept secret in the interest of national defense or foreign policy, and are in fact properly classified pursuant to such executive order.*

The applicable executive order currently in effect is Executive Order 12,356, 3 CFR 166 (1982). See Department of Justice, *Freedom of Information Case List* (1991 ed.) at 406-26 for discussion of litigation under this exemption, including issues of deference to agency classification, court review, Executive Order 12,356's provisions, and other issues.

In 1984 Congress amended the National Security Act of 1947 to exempt from FOIA's search and review requirements certain operational files of the Central Intelligence Agency. The CIA Information Act (Pub. L. No. 98-477, 98 Stat. 2209) did not broaden the CIA's authority to withhold information, but it relieves the CIA of the administrative burden of searching and reviewing files that almost always are classified or otherwise not releasable under FOIA.

> *(2) Records that are related solely to the internal personnel rules and practices of an agency.*

The case law on this exemption is divided, reflecting the manner in which the House and Senate reports addressed Exemption 2 when the FOIA was enacted. Compare S. Rep. No. 813, 89th Cong., 1st Sess. 8 (1965) (exemption relates only to internal personnel rules and practices within an agency) with H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966) (exemption does not cover all matters of internal management). The Supreme Court, in *Department of the Air Force v. Rose*, 425 U.S. 352 (1976), accepted the Senate report as authoritative for routine personnel matters.

The exemption, as interpreted by the courts, encompasses two distinct categories of information: (i) that related to internal agency matters of a relatively trivial nature, and (ii) that related to more substantial internal agency matters, the disclosure of which would enable persons to circumvent a legal requirement. A request for the former type of information is sometimes referred to as a "low 2" matter, while a request for the latter type of information is referred to as "high 2."

Leading cases interpreting Exemption 2 are *Founding Church of Scientology v. Smith*, 721 F.2d 828 (D.C. Cir. 1983) and *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051, 1073

(D.C. Cir. 1981) (en banc). See also *Schwaner v. Department of the Air Force*, 898 F. 2d 793 (D.C. Cir. 1990).

> *(3) Records that are specifically exempted from disclosure by statute (other than section 552b), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.*

Exemption 3 is triggered only by federal statutes, and not, for instance, by executive orders or regulations (*Washington Post Co. v. HHS*, 690 F.2d 252, 273 (D.C. Cir. 1982)) or by rules of the Supreme Court (*Founding Church of Scientology v. Bell*, 603 F.2d 945, 952 (D.C. Cir. 1979)). In *Reporter's Committee for Freedom of the Press v. Department of Justice*, 816 F.2d 730, 735 (D.C. Cir. 1987), *rev'd on other grounds*, 489 U.S. 749 (1989), the Court of Appeals for the D. C. Circuit held that congressional intent to exempt matters from disclosure must be found "in the actual words of the statute . . . or at least in the legislative history of FOIA" and not in the legislative history of a claimed withholding statute (citation omitted). The Privacy Act does not qualify as an Exemption 3 statute (5 U.S.C. §552a(t)(2), as added by Pub. L. No. 98-477, §2(c), October 15, 1984, 98 Stat. 2209). The Trade Secrets Act, 18 U.S.C. §1905, also does not qualify as an Exemption 3 statute, see *CNA Financial Corp. v. Donovan,* 830 F.2d 1132, 1137-43 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 977 (1988).

> *(4) Trade secrets and commercial or financial information obtained from a person and privileged or confidential.*

This category relates only to records that have been supplied to the government by a "person" (i.e., someone other than the government itself). If information relates to business or trade, most courts have little difficulty in finding it "commercial or financial." Most litigation of Exemption 4 issues has turned on the meaning of "confidential." The D.C. Circuit has held that information is confidential if disclosure is likely (i) to impair the government's ability to obtain information in the future, or (ii) to cause substantial harm to the competitive position of the submitter of the information (*National Parks and Conservation Ass'n v.*

Morton, 498 F.2d 765, 770 (D. C. Cir. 1974)). For a discussion of this test, see Department of Justice, *Freedom of Information Case List* (1991 ed.) at pages 458-722. Since *National Parks*, some courts have held that harm to governmental programs unrelated to the government's ability to obtain information might be grounds for protecting such information (*9 to 5 Organization for Women Office Workers v. Board of Governors of the Federal Reserve System*, 721 F.2d 1, 10 (1st Cir. 1983); *Critical Mass Energy Project v. NRC*, 830 F.2d 278, 286 (rehearing en banc granted) (D.C. Cir. 1987)).

The Trade Secrets Act, 18 U.S.C. §1905, imposes criminal penalties on agency employees who wrongfully disclose trade secrets. In *Chrysler Corp. v. Brown*, 441 U.S. 281, 319, n. 49 (1979), the Supreme Court held that Exemption 4 and the Trade Secrets Act are essentially congruent, limiting an agency's ability to make a discretionary release of material exempt under Exemption 4, because to do so in violation of the Trade Secrets Act would constitute a serious abuse of agency discretion. See also *CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1144-52, *cert. denied*, 485 U.S. 978 (1988).

A "reverse FOIA" case is one in which the submitter of information seeks to enjoin the agency from releasing that information in response to a third party's FOIA request. In *Chrysler Corp. v. Brown*, above, the Supreme Court held that submitters could not sue under the FOIA or the Trade Secrets Act, but only under the Administrative Procedure Act (5 U.S.C. §701, et seq.), claiming "arbitrary or capricious" agency behavior. A leading case on the scope of review in reverse FOIA cases is *NOW, Washington, D.C. Chapter v. Social Security Administration*, 736 F.2d 727, 745-47 (D.C. Cir. 1984).

The Conference recommended in 1982 that the FOIA be amended to broaden Exemption 4's coverage and to establish procedures to govern decisions to release information claimed to fall within the exemption. Recommendation 82-1, *Exemption (b)(4) of the Freedom of Information Act*, 47 Fed. Reg. 30,702 (1982). In 1987 the President issued an executive order that requires agencies to follow procedures concerning those decisions recommended by the Conference. Executive Order 12,600, *Predisclosure Notification Procedures for Confidential Commercial Information*, 3 CFR 235 (1988).

> *(5) Interagency or intraagency memorandums or letters which would not be available by law to a*

> *party other than an agency in litigation with the agency.*

Exemption 5 applies to documents normally privileged in the civil discovery context, and is not limited to those privileges mentioned in the legislative history (*United States v. Weber Aircraft Co.*, 465 U.S. 792, 800 (1984)). (See also *FTC v. Grolier Inc.*, 462 U.S. 19, 26 (1983); *Martin v. Office of Special Counsel*, 819 F.2d 1181, 1184 (D.C. Cir. 1987). The most frequently invoked privileges under Exemption 5 are the deliberative process privilege ("executive privilege"), the attorney work product privilege and the attorney-client privilege (*NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). For a discussion of the cases, *see* Department of Justice, *Freedom of Information Case List* (1991 ed.) at pages 476-502.

> *(6) Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.*

In 1982 the Supreme Court defined "similar files" broadly, holding that any information that "applies to a particular individual" may qualify for consideration under Exemption 6 (*Department of State v. Washington Post Co.*, 456 U.S. 595, 599-603 (1982)). The exemption may only be invoked to protect individuals; neither corporations nor associations possess protectable "personal privacy" interests. (See e.g., *Sims v. CIA*, 642 F.2d 562, 572 n.47 (D.C. Cir. 1980); *National Parks and Conservation Ass'n v. Kleppe*, 547 F.2d 673, 685, n.44 (D.C. Cir. 1976).)

In deciding to grant or deny a request for information under Exemption 6, the decisionmaker must balance the severity of the threat to an individual's privacy interest by disclosure against the public interest, if any, in disclosure (*Department of the Air Force v. Rose*, 425 U.S. 352, 372 (1976)). The FOIA's words "clearly unwarranted" modifying "invasion of personal privacy" tilts the balance in favor of disclosure (*Rose*, 425 U.S. at 378, n.16). However, where no public interest in disclosure exists, the information should be protected (*National Association of Retired Federal Employees v. Horner*, 879 F.2d 873, 879 (cert. denied) (D.C. Cir. 1989)). The Supreme Court's decision in *Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), enunciates principles that guide privacy/public interest balancing under both Exemptions 6 and 7(C) (below). For a discussion of the cases, see Department of Justice, *Freedom of*

Information Case List (1991 ed.) at pages 507-31. See also American Civil Liberties Union Foundation, *Litigation Under the Federal Freedom of Information Act and Privacy Act* (1991 ed.) at 119-40. For a recent U.S. Supreme Court decision on the effect of redaction on release of files containing personal information about individuals, see *Department of State v. Ray*, 60 U.S.L.W. 4047 (U.S. Dec. 17, 1991), *reversing* 908 F.2d 1549 (11th Cir. 1990).

> *(7) Records or information compiled for law enforcement purposes, but only to the extent that the production of such records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and in the case of a record or information compiled by a criminal law enforcement authority in the course of criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose investigative techniques and procedures for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual.*

When the FOIA was amended in 1974, Exemption 7 was narrowed to allow withholding of investigatory records compiled for law enforcement purposes, but only to the extent that disclosure of the records *would* cause one of six enumerated harms. Subsequently government agencies complained that the 1974 language provided inadequate protection for confidential sources, ongoing investigations, and law enforcement manuals and other materials. The FOIA Reform Act of 1986 (Pub. L. No. 99-570, §1802) amended the exemption again to significantly broaden the protection given to law enforcement records.

The FOIA Reform Act removed the requirement that records or information be "investigatory" in character. Thus, the protections listed in Exemption 7's six subparts now apply to all records or information compiled for law enforcement purposes regardless of the format in which it is maintained. The Reform Act also substituted "could reasonably be expected to" for "would" as the standard for the risk of harm with respect to subparagraphs (A) interference with enforcement proceedings, (C) unwarranted invasion of personal privacy, (D) disclosure of the identity of a confidential source, and (F) endanger the life or physical safety of any individual. This change eases a federal law enforcement agency's burden in invoking the exemption (*Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 756 n. 9 (1989). The Act also provided that the term "confidential source" includes state, local and foreign agencies and private institutions.

> *(8) Records that are contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.*

Although the legislative history of this broad exemption is not extensive, it was included to (i) protect the security of financial institutions by withholding from the public reports that contain frank evaluation of an institution's stability and (ii) promote cooperation and communication between financial institution employees and regulatory institution examiners (*Consumers Union of the United States v. Heimann*, 589 F.2d 531 (D.C. Cir. 1978)).

> *(9) Geological or geophysical information and data, including maps, concerning wells.*

Exemption 9 is only infrequently invoked. According to the House Report on the 1966 Act, the provision was added after witnesses contended that disclosure of seismic reports and other exploratory findings of oil companies would give speculators an unfair advantage over the companies that had invested heavily in exploration. H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966).

Judicial Review. A requester may bring suit in district court to compel the production of records wrongfully withheld by an agency (§552(a)(4)(B)-(G)). In addition, an agency's failure to comply with the time limits for either the initial request or the administrative appeal may be treated as a constructive exhaustion of administrative remedies, and a requester may immediately seek judicial review. A court, however, may withhold action if the agency is responding with due diligence and exceptional circumstances exist. The need to process an extremely large volume of requests has been held to constitute "exceptional circumstances," and the commitment of large amounts of resources to process requests on a first come, first served basis has been held to constitute "due diligence" (see *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605, 615-16 (D.C. Cir. 1976)).

A reviewing court will decide the case *de novo* and can examine agency records as necessary. The defending agency bears the burden of sustaining its action of withholding records. The agency may be required to prepare a "Vaughn" index (from *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974)), an itemized index that correlates each withheld document (or portion) with a specific FOIA exemption and the relevant part of the agency's nondisclosure justification.

A plaintiff who has "substantially prevailed" may recover attorneys' fees from the government (5 U.S.C. §552(a)(4)(E)). The plaintiff must show that prosecution of the suit was reasonably necessary to obtain the information and that a causal connection exists between the suit and the agency's production of the documents (see, e.g., *Weisberg v. Department of Justice*, 745 F.2d 1476 (D.C. Cir. 1984); *Vermont Low Income Advocacy Council, Inc. v. Usery*, 546 F.2d 509, 513 (2nd Cir. 1976)). A fee award is discretionary with the court and is based on four criteria: (1) the public benefit derived from the case; (2) the commercial benefit to the complainant; (3) the nature of the complainant's interest in the records sought; and (4) whether the government's withholding had a reasonable basis in law (*Fenster v. Brown*, 617 F.2d 740, 742 (D.C. Cir. 1979)).

Reports. Each agency must make an annual report to Congress containing both summaries and details of matters related to FOIA §552(e). The attorney general must submit an annual report on judicial activity related to FOIA.

Legislative History:

Federal laws bearing on public access to government information date to 1789 (see 1 Stat. 28, 49, 65, 68 (1789)). Under the Housekeeping Statute (5 U.S.C. §301) agency heads have long had the authority to control the dissemination of information from the files of their departments. Section 3 of the Administrative Procedure Act of 1946 (the "public disclosure" section, 5 U.S.C. §1002 (1964 ed.)) provided that the public could obtain agency information if (1) the matter was of official public record, (2) no other statute barred release of the information, (3) persons seeking access followed published agency rules, (4) persons seeking access could show a "proper" and "direct" concern, and (5) the agency did not otherwise find good cause to hold the information confidential.

The Freedom of Information Act evolved after a decade of debate among agency officials, legislators, and public interest group representatives (most notably, members of the press). The FOIA, which was shaped largely by the efforts of Representative John Moss, revised the public disclosure section of the Administrative Procedure Act, which had come to be looked upon as falling far short of its disclosure goals. See J.T. O'Reilly, *Federal Information Disclosure* §2.02 (2d ed. 1990); S. Rep. No. 813, 89th Cong., 1st Sess. 5 (1965)).

The FOIA was enacted in 1966 as new section 552 of title 5, United States Code (Pub. L. No. 89-554, September 6, 1966, 80 Stat. 383). The Act provided access to "any person" without requiring a showing of need, ensured the right to go to court to enforce its provisions, and left the agencies no discretion to sidestep its mandatory disclosure requirements. Despite these changes to the APA, the FOIA contained, in the views of many, both procedural and substantive weaknesses. Courts responded to some of the Act's weaknesses by fashioning procedural aids or interpretations, such as the requirement for an agency to provide a detailed index of withheld documents (established in *Vaughn v. Rosen*, above) and the requirement that agencies release segregable, nonexempt portions of a partially exempt record (established in *EPA v. Mink*, 410 U.S. 73 (1973)).

Representative Moorhead's House hearings in 1972-73 (see, for example, *Administration of the Freedom of Information Act*, H.R. Rep. No. 1419, 92d Cong., 2d Sess. (1972)) identified four problems with the 1966 Act:

- Agency refusal to supply information by use of an exemption in the Act was commonplace;

- Long delays in responding to requests often made the information useless once provided;

- Delaying tactics during litigation unreasonably extended both the time and the costs to the requester; and

- Lack of technical compliance with the requirements of the Act, as interpreted by the agency, often led to a refusal to supply requested information.

The FOIA was substantially amended in 1974 to address these problems and also in reaction to the abuses of the Watergate era. The 1974 amendments (Pub. L. No. 93-502, §§1-3, November 21, 1974, 88 Stat. 1561-64) substantially narrowed the scope of the FOIA's law enforcement and national security exemptions, and broadened the procedural provisions relating to fees, time limits, segregability, and in camera inspection by the courts of withheld information.

In 1976 Congress, by means of a rider to the Sunshine Act (Pub. L. No. 94-409, §5(b), September 13, 1976, 90 Stat. 1241), again limited the agencies' ability to withhold information, this time by narrowing Exemption 3 relating to the incorporation of the non-disclosure provisions of other statutes.

In 1981 FOIA reform was again the subject of congressional hearings (see generally *Freedom of Information Act: Hearings on S. 587, S. 1235, S. 1247, S. 1730, and S. 1751 before the Subcommitte on the Constitution of the Senate Committee on the Judiciary*, 97th Cong., 1st Sess. (1981) (two volumes)). In 1983 Senator Hatch introduced S. 774, which, among other things, would have considerably broadened Exemption 4 relating to business records. The Hatch Bill was passed by the Senate in the 98th Congress (130 Cong. Rec. S1794 (daily ed. February 27, 1984)), but it was not considered by the House.

In 1984 Congress eliminated the requirement that FOIA proceedings have precedence over all cases on federal court dockets (Pub. L. No. 98-620, title IV, §402(2), November 8, 1984, 98 Stat. 3357). In 1984 Congress also passed the CIA Information Act (Pub. L. No. 98-477, 98 Stat. 2209), which amended the National Security Act of 1947 to exempt certain operational files of the Central Intelligence Agency from FOIA's search and review requirements. The Act was intended to relieve the CIA of the administrative burden of searching and reviewing files that almost always are classified or otherwise not releasable under FOIA. See H.R. Rep. No. 726, Part 1, 98th Cong., 2d Sess. 4 (1984) (Permanent Select Committee on Intelligence).

In 1986, Congress included FOIA amendments in the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, §§1801-1804, October 27, 1986, 100 Stat. 3207-48- 3207-50). The FOIA amendments are in subtitle N, the "Freedom of Information Reform Act of 1986." The Act broadened Exemption 7's applicability to records compiled for law enforcement purposes and established new FOIA fee standards and required each agency to adopt a schedule of fees that conforms to guidelines promulgated by the Director of the Office of Management and Budget.

Source Note:

The Freedom of Information Case List, published annually by the Department of Justice, contains an indexed listing of all court cases dealing with the FOIA, an extensive bibliography of FOIA-related materials, and other information on the FOIA. The *Case List* also includes the Justice Department Guide to the Freedom of Information Act, which elaborates on many of the terms used in the Act and points the reader to significant cases bearing on the various provisions of the FOIA.

Another valuable source of practical information about, and interpretation of, the FOIA is *Litigation Under the Federal Freedom of Information Act and Privacy Act*. The 16th and most recent edition was published in 1991 by the American Civil Liberties Union Foundation. Earlier editions were published by the Center for National Security Studies and the Freedom of Information Clearinghouse.

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2. House of Representatives Committee on Government Operations, *Clarifying and Protecting the Right of the Public to Information*, H.R. Rep. No. 1497, 89th Cong., 2d Sess. (1966).

3. House of Representatives Committee on Government Operations, *Freedom of Information Act Requests for Business Data and Reverse FOIA Lawsuits*, H.R. Rep. No. 1382, 95th Cong., 2d Sess. (1978).

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II. Other Government Documents

1. Administrative Conference of the U.S., Recommendation 83-4, *Use of the FOIA for Discovery Purposes*, 1 CFR §305.83-4 (1992).

2. Administrative Conference of the U.S., Recommendation 88-10, *Federal Agency Use of Computers in Acquiring and Releasing Information*, 1 CFR §305.88-10 (1992).

3. Administrative Conference of the U.S., Recommendation 89-8, *Agency Practices and Procedures for the Indexing and Public Availability of Adjudicatory Decisions*, 1 CFR §305.89-8 (1992).

4. Administrative Conference of the U.S., Recommendation 90-5, *Federal Agency Electronic Records Management and Archives*, 1 CFR §305.90-5 (1992).

5. Administrative Conference of the U.S., *Statement on Resolution of Freedom of Information Act Disputes* (adopted June 1987), 1 CFR §310.12 (1991).

6. *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act (FOIA)* (June 1967, 40 pages) (Out of print; *reprinted in* Prentice-Hall, Inc., Government Disclosure Service, vol. 1 ¶300,601).

7. *Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act* (February 1975).

8. *Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act* (December 1987).

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14. U. S. Department of Justice, *FOIA Update*, a newsletter of information and guidance for federal agencies, published quarterly by the Office of Information and Privacy. (Available from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.)

15. U. S. Department of Justice, *Freedom of Information Case List*, an alphabetical compilation of judicial decisions addressing access issues under the Freedom of Information Act and Privacy Act, published annually by the Office of Information and Privacy. Includes a topical index to the cases, texts of the acts, a comprehensive FOIA bibliography, and Justice Department Guide to the Freedom of Information Act. (Available from the

Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.)

III. Nongovernment Publications

1. *Access Reports*, a biweekly newsletter published by Access Reports, Inc., Lynchburg, VA.

2. *Litigation under the Federal Freedom of Information Act and Privacy Act, 16th Edition* (The American Civil Liberties Union Foundation 1991).

3. J.R. O'Reilly, *Federal Information Disclosure* (Shepard's/McGraw-Hill Book Co., P.O. Box 35300, Colorado Springs, Colo. 80935-3530) (2d ed. 1990, semi-annual supplements).

IV. Other FOIA Articles

Several hundred articles dealing with the Freedom of Information Act have been published in law reviews and other journals and periodicals. An extensive listing may be found in the *Freedom of Information Case List*, published annually by the Department of Justice, cited above.

Agency Regulations:

ACTION	45 CFR Part 1215
Administrative Conference of the United States	1 CFR Part 304
Agency for International Development	22 CFR Part 212
Agriculture (Office of the Secretary)	7 CFR Part 1
Architectural and Transportation Barriers Board	36 CFR Part 1120
Arms Control and Disarmament Agency	22 CFR Part 602
Central Intelligence Agency	32 CFR Part 1900
Civil Rights Commission	45 CFR Part 704
Commerce (Office of the Secretary)	15 CFR Part 4
Bureau of the Census	15 CFR Part 60
National Oceanic & Atmospheric Administration	15 CFR 903
Commodity Futures Trading Commission	17 CFR Part 145
Consumer Product Safety Commission	16 CFR Part 1015
Defense (Office of the Secretary)	32 CFR Part 285

Education (Office of the Secretary)	34 CFR Part 5
Energy (Office of the Secretary)	10 CFR Part 9
Federal Energy Regulatory Commission	18 CFR Part 388
Environmental Protection Agency	40 CFR Part 2
Equal Employment Opportunity Commission	29 CFR Part 1610
Export-Import Bank of the United States	12 CFR Part 404
Farm Credit Administration	12 CFR Part 602
Federal Communications Commission	47 CFR Part 0
Federal Deposit Insurance Corporation	12 CFR Part 309
Federal Emergency Management Agency	44 CFR Part 5
Federal Labor Relations Authority	5 CFR Part 2411
Federal Maritime Commission	46 CFR Part 503
Federal Mediation and Conciliation Service	29 CFR Part 1401
Federal Reserve System	12 CFR Part 261
Federal Trade Commission	16 CFR Part 4
General Services Administration	41 CFR Part 105-60
Health & Human Services	45 CFR Part 5
Food and Drug Administration	21 CFR Part 20
Health Care Financing Administration	42 CFR Part 401
Social Security Administration	20 CFR Part 401
Housing & Urban Development	24 CFR Part 15
Interior	43 CFR Part 2
International Trade Commission	19 CFR Part 201
Interstate Commerce Commission	49 CFR Part 1001
Justice	28 CFR Part 16
Immigration and Naturalization Service	8 CFR Part 103
Labor	29 CFR Part 70
Occupational Safety and Health Administration	29 CFR Part 1912
Legal Services Corporation	45 CFR Part 1602
Marine Mammal Commission	50 CFR Part 520
Merit Systems Protection Board	5 CFR Part 1204
National Aeronautics and Space Administration	14 CFR Part 1206
National Credit Union Administration	12 CFR Part 792
National Foundation on the Arts and the Humanities	45 CFR Part 1100
National Labor Relations Board	29 CFR Part 102
National Science Foundation	45 CFR Part 612

National Transportation Safety Board	49 CFR Part 801
Nuclear Regulatory Commission	10 CFR Part 9
Occupational Safety and Health Review Commission	29 CFR Part 2201
Office of Management and Budget	5 CFR Part 1303
Office of Personnel Management	5 CFR Part 294
Office of United States Trade Representative	15 CFR Part 2004
Pension Benefit Guaranty Corporation	29 CFR Part 2603
Postal Rate Commission	39 CFR Part 3001
Postal Service	39 CFR Part 265
Securities and Exchange Commission	17 CFR Parts 200
Selective Service System	32 CFR Part 1662
Small Business Administration	13 CFR Part 102
State	22 CFR Part 171
Transportation (Office of the Secretary)	49 CFR Part 7
Treasury	31 CFR Part 1
Comptroller of the Currency	12 CFR Part 4
Customs Service	19 CFR Part 103
Internal Revenue Service	26 CFR Part 601
Office of Thrift Supervision	12 CFR Part 505
Veterans Affairs	38 CFR Part 1

Appendix:

1. Freedom of Information Act, 5 U.S.C. §552.
2. Executive Order 12,600, Predisclosure Notification Procedures for Confidential Commercial Information, 3 CFR 235 (1988).

Freedom of Information Act

Title 5, U.S. Code

§552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public--

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying--

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if--

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4)(A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.

(ii) Such agency regulations shall provide that--

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section--

(I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or

(II) for any request described in clause (ii) (II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.

(v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed $250.

(vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: Provided, That the court's review of the matter shall be limited to the record before the agency.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

[(D) Repealed. Pub. L. No. 98-620, title IV, §402(2), Nov. 8, 1984, 98 Stat. 3357.]

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall--

(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request--

(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(b) This section does not apply to matters that are--

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c)(1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) and--

(A) the investigation or proceeding involves a possible violation of criminal law; and

(B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings,

the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.

(2) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of this section unless the informant's status as an informant has been officially confirmed.

(3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.

(d) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(e) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include--

(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

(4) the results of each proceeding conducted pursuant to subsection (a)(4)(F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

(5) a copy of every rule made by such agency regarding this section;

(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a)(4)(E), (F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(f) For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

(Pub. L. No. 89-554, Sept. 6, 1966, 80 Stat. 383; Pub. L. No. 90-23, §1, June 5, 1967, 81 Stat. 54; Pub. L. No. 93-502, §§1-3, Nov. 21, 1974, 88 Stat. 1561-

1564; Pub. L. No. 94-409, §5(b), Sept. 13, 1976, 90 Stat. 1247; Pub. L. No. 95-454, title IX, §906(a)(10), Oct. 13, 1978, 92 Stat. 1225; Pub. L. No. 98-620, title IV, §402(2), Nov. 8, 1984, 98 Stat. 3357; Pub. L. No. 99-570, title I, §§1802, 1803, Oct. 27, 1986, 100 Stat. 3207-48, 3207-49.)

AMENDMENTS

1986 Subsec. (a)(4)(A). Pub. L. No. 99-570, §1803, amended subpar. (A) generally. Prior to amendment, subpar. (A) read as follows: "In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public."

Pub. L. No. 99-570, §1802(a), amended par. (7) generally. Prior to amendment, par. (7) read as follows: "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;".

Subsecs. (c) to (f). Pub. L. No. 99-570, §1802(b), added subsec. (c) and redesignated former subsecs. (c) to (e) as (d) to (f), respectively.

1984 Subsec. (a)(4)(D). Pub. L. No. 98-620 repealed subpar. (D) which provided for precedence on the docket and expeditious disposition of district court proceedings authorized by subsec. (a).

1978 Subsec. (a)(4)(F). Pub. L. No. 95-454 substituted references to the Special Counsel for references to the Civil Service Commission wherever appearing and reference to his findings for reference to its findings.

1976 Subsec. (b)(3). Pub. L. No. 94-409 inserted provision excluding section 552b of this title from applicability of exemption from disclosure and provision setting forth conditions for statute specifically exempting disclosure.

1974 Subsec. (a)(2). Pub. L. No. 93-502, §1(a), substituted provisions relating to maintenance and availability of current indexes, for provisions relating to maintenance and availability of a current index, and inserted provisions relating to publication and distribution of copies of indexes or supplements thereto.

Subsec. (a)(3). Pub. L. No. 93-502, §1(b)(1), substituted provisions requiring requests to reasonably describe records for provisions requiring requests, for identifiable records, and struck out provisions setting forth procedures to enjoin agencies from withholding the requested records and ordering their production.

Subsec. (a)(4), (5). Pub. L. No. 93-502, §1(b)(2), added par. (4) and redesignated former par. (4) as (5).

Subsec. (a)(6). Pub. L. No. 93-502, §1(c), added par. (6).

Subsec. (b)(1). Pub. L. No. 93-502, §2(a), designated existing provisions as cl. (A), substituted "authorized under criteria established by an" for "required by", and added cl. (B).

Subsec. (b)(7). Pub. L. No. 93-502, §2(b), substituted provisions relating to exemption for investigatory records compiled for law enforcement purposes, for provisions relating to exemption for investigatory files compiled for law enforcement purposes.

Subsec. (b), foll. par. (9). Pub. L. No. 93-502, §2(c), inserted provision relating to availability of segregable portion of records.

Subsecs. (d), (e). Pub. L. No. 93-502, §3, added subsecs. (d) and (e).

1967 Subsec. (a). Pub. L. No. 90-23 substituted introductory statement requiring every agency to make available to the public certain information for former introductory provision excepting from disclosure (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating to internal management of an agency, covered in subsec. (b)(1) and (2) of this section.

Subsec. (a)(1). Pub. L. No. 90-23 incorporated provisions of: former subsec. (b)(1) in (A), inserting requirement of publication of names of officers as sources of information and provision for public to obtain decisions, and striking out publication requirement for delegations by the agency of final authority; former subsec. (b)(2), introductory part, in (B); former subsec. (b)(2), concluding part, in (C), inserting publication requirement for rules of procedure and descriptions of forms available or the places at which forms may be obtained; former subsec. (b)(3), introductory part, in (D), inserting requirement of general applicability of substantive rules and interpretations, added clause (E), substituted exemption of any person from failure to resort to any matter or from being adversely affected by any matter required to be published in the Federal Register but not so published for former subsec. (b)(3), concluding part, excepting from publication rules addressed to and served upon named persons in accordance with laws and final sentence reading "A person may not be required to resort to organization or procedure not so published" and inserted provision deeming matter, which is reasonably available, as published in the Federal Register when such matter is incorporated by reference in the Federal Register with the approval of its Director.

Subsec. (a)(2). Pub. L. No. 90-23 incorporated provisions of former subsec. (c), provided for public copying of records, struck out requirement of agency publication of final opinions or orders and authority for secrecy and withholding of opinions and orders required for good cause to be held confidential and not cited as precedents, latter provision now superseded by subsec. (b) of this section, designated existing subsec. (c) as clause (A), including provision for availability of concurring and dissenting opinions, inserted provisions for availability of policy statements and interpretations in clause (B) and staff manuals and instructions in clause (C), deletion of personal identifications from records to protect personal privacy with written justification therefor, and provision for indexing and prohibition of use of records not indexed against any private party without actual and timely notice of the terms thereof.

Subsec. (a)(3). Pub. L. No. 90-23 incorporated provisions of former subsec. (d) and substituted provisions requiring identifiable agency records to be made available to any person upon request and compliance with rules as to time, place, and procedure for inspection, and payment of fees and provisions for Federal district court proceedings de novo for enforcement by contempt of noncompliance with court's orders with the burden on the agency and docket precedence for such proceedings for former provisions requiring matters of official record to be made available to persons properly and directly concerned except information held confidential for good cause shown, the latter provision superseded by subsec. (b) of this section.

Subsec. (a)(4). Pub. L. No. 90-23 added par. (4).

Subsec. (b). Pub. L. No. 90-23 added subsec. (b) which superseded provisions excepting from disclosure any function of the United States requiring secrecy in the public interest or any matter relating to internal management of an agency, formerly contained in former subsec. (a), final opinions or orders required for good cause to be held confidential and not cited as precedents, formerly contained in subsec. (c), and information held confidential for good cause found, contained in former subsec. (d) of this section.

Subsec. (c). Pub. L. No. 90-23 added subsec. (c).

Executive Order 12,600

Predisclosure Notification Procedures for Confidential Commercial Information, 3 CFR 235 (1988)

Executive Order 12600 of June 23, 1987

Predisclosure Notification Procedures for Confidential Commercial Information

By the authority vested in me as President by the Constitution and statutes of the United States of America, and in order to provide predisclosure notification procedures under the Freedom of Information Act concerning confidential commercial information, and to make existing agency notification provisions more uniform, it is hereby ordered as follows:

Section 1. The head of each Executive department and agency subject to the Freedom of Information Act shall, to the extent permitted by law, establish procedures to notify submitters of records containing confidential commercial information as described in section 3 of this Order, when those records are requested under the Freedom of Information Act (FOIA), 5 U.S.C. 552, as amended, if after reviewing the request, the responsive records, and any appeal by the requester, the department or agency determines that it may be required to disclose the records. Such notice requires that an agency use good-faith efforts to advise submitters of confidential commercial information of the procedures established under this Order. Further, where notification of a voluminous number of submitters is required, such notification may be accomplished by posting or publishing the notice in a place reasonably calculated to accomplish notification.

Sec. 2. For purposes of this Order, the following definitions apply:

(a) "Confidential commercial information" means records provided to the government by a submitter that arguably contain material exempt from release under Exemption 4 of the Freedom of Information Act, 5 U.S.C. 552(b)(4), because disclosure could reasonably be expected to cause substantial competitive harm.

(b) "Submitter" means any person or entity who provides confidential commercial information to the government. The term "submitter" includes, but is not limited to, corporations, state governments, and foreign governments.

Sec. 3. (a) For confidential commercial information submitted prior to January 1, 1988, the head of each Executive department or agency shall, to the extent permitted by law, provide a submitter with notice pursuant to section 1 whenever:

(i) the records are less than 10 years old and the information has been designated by the submitter as confidential commercial information; or

(ii) the department or agency has reason to believe that disclosure of the information could reasonably be expected to cause substantial competitive harm.

(b) For confidential commercial information submitted on or after January 1, 1988, the head of each Executive department or agency shall, to the extent permitted by law, establish procedures to permit submitters of confidential commercial information to designate, at the time the information is submitted to the Federal government or a reasonable time thereafter, any information the disclosure of which the submitter claims could reasonably be expected to cause substantial competitive harm. Such agency procedures may provide for the expiration, after a specified period of time or changes in circumstances, of designations of competitive harm made by submitters. Additionally, such procedures may permit the agency to designate specific classes of information that will be treated by the agency as if the information had been so designated by the submitter. The head of each Executive department or agency shall, to the extent permitted by law, provide the submitter notice in accordance with section 1 of this Order whenever the department or agency determines that it may be required to disclose records:

(i) designated pursuant to this subsection; or

(ii) the disclosure of which the department or agency has reason to believe could reasonably be expected to cause substantial competitive harm.

Sec. 4. When notification is made pursuant to section 1, each agency's procedures shall, to the extent permitted by law, afford the submitter a reasonable period of time in which the submitter or its designee may object to the disclosure of any specified portion of the information and to state all grounds upon which disclosure is opposed.

Sec. 5. Each agency shall give careful consideration to all such specified grounds for nondisclosure prior to making an administrative determination of the issue. In all instances when the agency determines to disclose the requested records, its procedures shall provide that the agency give the submitter a written statement briefly explaining why the submitter's objections are not sustained. Such statement shall, to the extent permitted by law, be provided a reasonable number of days prior to a specified disclosure date.

Sec. 6. Whenever a FOIA requester brings suit seeking to compel disclosure of confidential commercial information, each agency's procedures shall require that the submitter be promptly notified.

Sec. 7. The designation and notification procedures required by this Order shall be established by regulations, after notice and public comment. If similar procedures or regulations already exist, they should be reviewed for conformity and revised where necessary. Existing procedures or regulations need not be modified if they are in compliance with this Order.

Sec. 8. The notice requirements of this Order need not be followed if:

(a) The agency determines that the information should not be disclosed;

(b) The information has been published or has been officially made available to the public;

(c) Disclosure of the information is required by law (other than 5 U.S.C. 552);

(d) The disclosure is required by an agency rule that (1) was adopted pursuant to notice and public comment, (2) specifies narrow classes of records submitted to the agency that are to be released under the Freedom of Information Act, and (3) provides in exceptional circumstances for notice when the submitter provides written justification, at the time the information is submitted or a reasonable time thereafter, that disclosure of the information could reasonably be expected to cause substantial competitive harm;

(e) The information requested is not designated by the submitter as exempt from disclosure in accordance with agency regulations promulgated pursuant to section 7, when the submitter had an opportunity to do so at the time of submission of the information or a reasonable time thereafter, unless the agency has substantial reason to believe that disclosure of the information would result in competitive harm; or

(f) The designation made by the submitter in accordance with agency regulations promulgated pursuant to section 7 appears obviously frivolous; except that, in such case, the agency must provide the submitter with written notice of any final administrative disclosure determination within a reasonable number of days prior to the specified disclosure date.

Sec. 9. Whenever an agency notifies a submitter that it may be required to disclose information pursuant to section 1 of this Order, the agency shall also notify the requester that notice and an opportunity to comment are being provided the submitter. Whenever an agency notifies a submitter of a final decision pursuant to section 5 of this Order, the agency shall also notify the requester.

Sec. 10. This Order is intended only to improve the internal management of the Federal government, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.

RONALD REAGAN

THE WHITE HOUSE.

Government in the Sunshine Act

Citations:

5 U.S.C. §552b; enacted September 13, 1976 by Pub. L. No. 94-409, 90 Stat. 1241.

Overview:

The principal operative provision of the Government in the Sunshine Act, section 3, amends title 5 of the U.S. Code to add a new section 552b, entitled "Open Meetings."[1] Section 3 requires, in general, that meetings of each federal agency headed by a collegial body, a majority of whose members are appointed by the President with the advice and consent of the Senate, shall be open to public observation. (Approximately 50 federal agencies are subject to the Government in the Sunshine Act, including the major independent regulatory commissions, such as the Interstate Commerce Commission, Securities and Exchange Commission, Federal Trade Commission, Federal Communications Commission, Consumer Product Safety Commission, and National Labor Relations Board). The right of observation provided by the Act does not include any right to participate in the agency's deliberations. The Act provides certain exemptions from the open meeting requirement and prescribes in detail the procedures that the agency must follow to invoke an exemption and close a meeting.

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[1] Section 4 of Pub. L. No. 94-409 amends the Administrative Procedure Act, 5 U.S.C. §557, to forbid ex parte communications in certain agency proceedings (see Chapter 1, Administrative Procedure Act). Section 5 makes minor amendments in several other statutes. Neither section relates directly to the subject of agency open meetings.

Summary. The principal provisions of section 3 may be summarized briefly. Subsection (a) defines the basic terms "agency," "meeting," and "member." Subsection (b) declares a presumption in favor of open meetings. Subsection (c) allows an agency to close a meeting or portion of a meeting or to withhold information about a meeting or portion of a meeting if the agency determines that the meeting or portion, if opened, or the information, if released, would be likely to disclose information protected from disclosure under 1 or more of the 10 exemptions of subsection (c). These exemptions are permissive, not mandatory, and subsection (c) also provides that agency meetings otherwise exempt shall be open "where the agency finds that the public interest [so] requires."

Exemptions. The exemptions in subsection (c) generally parallel those in the Freedom of Information Act (5 U.S.C. §552 (1988)). There is, however, an important exception. There is no exemption in the Sunshine Act that parallels the fifth exemption in the Freedom of Information Act for interagency and intraagency memoranda and letters. This is because, while the FOIA recognizes the legitimate governmental interest in protecting the agency deliberative process as such, the Sunshine Act aims at maximum exposure of that process, at least at the collegial level. (See R. Berg and S. Klitzman, *An Interpretive Guide to the Government in the Sunshine Act* 98 (1978).)

On the other hand, the Sunshine Act does have two important exemptions that lack counterparts in the FOIA and that protect the deliberative process in certain defined circumstances. Exemption 9 permits those agencies that regulate securities, commodities, or financial institutions to close meetings to protect information, the disclosure of which would lead to speculation or endanger the stability of financial institutions. More broadly, it permits any agency to close a meeting to protect information, the disclosure of which would be likely to frustrate the implementation of a proposed agency action. Exemption 10 permits closure of meetings that concern agency participation in pending or anticipated litigation or the disposition by the agency of particular cases involving formal adjudication.

Procedures for Closing Meetings. Subsections (d), (e), and (f) prescribe the procedures agencies must follow in closing meetings, announcing and changing meetings, and withholding and/or releasing substantive information regarding such meetings. Under subsection (d)(1), agencies may decide to close meetings or withhold information about meetings only by recorded majority vote of the entire membership of the agency. Subsection (d)(2) allows a "person whose interests may be directly affected by a portion of a meeting" to request closure based on exemptions (5), (6), or (7). The agency need vote on the request only "upon request of any one of its members." Subsection (d)(3) requires that, within 1 day of any vote to close or to withhold information about a meeting taken under subsections (d)(1) or (d)(2), the agency must "make publicly available" a written copy of the vote of each member. If the vote is to close or to withhold information, the agency must also make available "a full written explanation" of the closing and a list of all expected attendees and their affiliations. Subsection (d)(4) allows an agency, a majority of whose meetings may be closed under exemptions (4), (8), (9)(A), or (10), to close its meetings by expedited procedures and to dispense with some of the procedural requirements of subsections (d)(1), (d)(3), and (e).

Publicizing Meetings. Subsection (e)(1) requires that the agency publicly announce, at least 1 week prior to the meeting, its time, place, and subject matter, whether it is to be open or closed, and the name and telephone number of an agency contact person to provide additional information. The subsection also permits the agency to provide less than 7 days notice of a meeting, provided a majority of the membership determines by recorded vote "that agency business requires" less notice, and the agency makes the requisite public announcement "at the earliest practicable time" and, in the case of a change in subject matter or open or closed status, a majority recorded vote is cast. Subsection (e)(1) and (e)(2) requires that information about the time, place, and subject matter of meetings, as well as changes in the time or place of meetings, must also be submitted for publication in the Federal Register. Furthermore, agencies are to use "reasonable means" to ensure that the public is fully informed of public announcements, including posting notices on bulletin boards, publishing them in special interest journals, and distributing them to a mailing list. (See *An Interpretive Guide to the Government in the Sunshine Act* 55-56 (1978).)

Recordkeeping. Subsection (f)(1) requires that, for every meeting closed under one or more of the exemptions of subsection (c), the general counsel or chief legal officer of the agency must certify that the meeting may properly be closed. The agency must retain a copy of the certification and a statement from the presiding officer of the meeting stating the time and place of the meeting and listing the persons actually present. The agency must also maintain a complete verbatim transcript or electronic recording of all closed meetings, except that it may instead maintain detailed minutes of any meeting closed under exemptions (8), (9)(A), or (10). Subsection (f)(2) requires the agency to make "promptly available" for public inspection and copying a copy of the transcript, recording, or minutes, except for information exempted and withheld pursuant to subsection (c). The agency is also required under subsection (f)(2) to maintain for at least 2 years a complete verbatim copy of the transcript, recording or minutes.

Judicial Review. Subsection (g) provides for the issuance of agency rules to implement the Act. The Administrative Conference of the United States is given the responsibility for consulting with agencies prior to their issuance of regulations to implement the Act. Subsection (h) provides for judicial review of agency decisions to close meetings. Such decisions may be challenged either in a separate proceeding in district court (subsection (h)(1)), or as part of a proceeding for review of the agency action taken at the meeting (subsection (h)(2)). However, the courts are discouraged from reversing the agency action simply because it was taken at a meeting that was improperly closed. Thus, whether the proceeding is under subsection (h)(1) or subsection (h)(2), the relief available is likely to be limited to access to the transcript of the meeting and injunctive relief against future violations. In addition, under subsection (i) a successful plaintiff may be entitled to an award of attorneys' fees.

Legislative History:

Senate. The legislation that was to become the Government in the Sunshine Act, was first introduced in the 92d Congress on August 4, 1972 by Senator Lawton Chiles of Florida as S. 3881 (118 Cong. Rec. 26902-19). No action was taken on the bill, and Senator Chiles reintroduced the bill, in the 93d Congress on January 9, 1973, as S. 260 (119 Cong. Rec. 646-651).

The bill was referred to the Subcommittee on Reorganization, Research and International Organizations of the Senate Committee on Government Operations, where it underwent several revisions. In 1974 the subcommittee held 3 days of hearings on Committee Print No. 3 (*Hearings on S. 260 before the Subcommittee on Reorganization, Research and International Organizations of the Senate Committee on Government Operations*, 93d Cong., 2d Sess., May 21 and 22, October 15, 1974).

Subsequent to the October 1974 hearing, the Subcommittee prepared Committee Print No. 4 of S. 260, which was introduced by Senator Chiles on January 15, 1975 in the 94th Congress as S. 5 (121 Cong. Rec. 241-246).

On July 31, 1975, without further hearings, the Committee on Government Operations reported S. 5 with amendments (S. Rep. No. 94-354, 94th Cong., 1st Sess. (1975)). As reported, the bill consisted of two titles, title I, meetings of congressional committees, and title II, agency meetings and *ex parte* communications.

Title I was referred to the Senate Committee on Rules and Administration, which on September 18, 1975 reported out S. 5 and recommended that title I be deleted from the bill (S. Rep. No. 94-381, 94th Cong., 1st Sess. (1975)).

On November 5, 1975, title I was deleted on the floor of the Senate (121 Cong. Rec. 35218). On November 6, 1975 S. 5 as amended was considered and passed without significant further amendment by a vote of 94-0 (121 Cong. Rec. 35321-36).

House. A bill identical to title II of S. 5, as reported by the Senate Committee on Government Operations, was introduced in the House of Representatives by Representative Dante Fascell of Florida on September 26, 1975, as H.R. 9868. (121 Cong. Rec. H 921). On October 22, 1975, Representative Bella Abzug of New York introduced H.R. 10315, an amended version of title II of S. 5. (121 Cong. Rec. H10242). The House versions were referred sequentially to the committees on Government Operations and the Judiciary. On November 6 and 12, 1975, the Subcommittee on Government Information and Individual Rights of the House Government Operations Committee held hearings on H.R. 10315 and H.R. 9868.

On February 3, 1976, a clean bill was introduced in the House by Representatives Abzug, Fascell, and others as H.R. 11656 (122 Cong. Rec. H670), and it was reported out by the House Government Operations Committee on March 8, 1976 (H.R. Rep. No. 94-880, Pt. I, 94th Cong., 2d Sess. (1976)). On March 24 and 25, 1976, the Subcommittee on Administrative Law and Governmental Relations of the House Judiciary Committee held hearings on H.R. 11656, and on April 8, 1976, the House Judiciary Committee reported H.R. 11656 with amendments (H.R. Rep. No. 94-880, Pt. II, 94th Cong., 2d Sess. (1976)). On July 28, 1976, the House considered and passed H.R. 11656, with floor amendments, and then took up S. 5 and amended it to substitute the text of the House bill. S. 5 was then passed by a vote of 390-5 and sent to a Senate-House Conference (122 Cong. Rec. H7863-902).

Conference Committee and Enactment. On August 26 and 27, 1976, the report of the conference committee was filed, respectively, in the House and Senate (H.R. Rep. No. 94-1441; S. Rep. No. 94-1178, 94th Cong., 2d Sess. (1976)). On August 31, 1976, the report was adopted by voice vote in the Senate (122 Cong. Rec. 15043-45) and by a vote of 384-0 in the House (122 Cong. Rec. H9258-62). On September 13, 1976, President Ford signed the bill into law, to go into effect March 12, 1977 (Pub. L. No. 94-409, 90 Stat 1241, 12 Weekly Compilation of Presidential Documents 1233 (September 20, 1976)).

Significant Case Law:

Communications Systems v. FCC, 595 F.2d 797 (D.C. Cir. 1978), holds that agencies are not precluded by the Act from disposing of matters through notation voting rather than at meetings.

Common Cause v. Nuclear Regulatory Commission, 674 F.2d 921 (D.C. Cir. 1982), holds that exemption 9(b) does not cover meetings to consider the agency's budget proposals.

FCC v. ITT World Communications, 446 U.S. 463, 104 S. Ct. 1936 (1984), is an important decision on the definition of "meeting" under the Act.

Clark - Cowlitz Joint Operating Agency v. FERC, 798 F.2d 499 (D.C. Cir. 1986), holds that where a meeting is closed pursuant to exemption 10 of the Sunshine Act, the need for confidentiality may survive the termination of the proceedings that were the subject of agency discussion and that the agency's determination that the public interest does not require the opening of a meeting eligible for closure is not subject to judicial review.

Public Citizen v. National Economic Commission, 703 F. Supp. 113 (D. D. C. 1989), holds that exemption 9(b) was not available as the basis for closing a meeting to facilitate candid discussion (the case involves comparable exemptions under the Federal Advisory Committee Act, 5 U.S.C. App. II, §10(d) (1988)).

Energy Research Foundation v. Defense Nuclear Facilities Safety Board, 917 F.2d 581 (D.C. Cir. 1990), holds that the Board in question is an "agency" for purposes of the Government in the Sunshine Act (and the FOIA).

Source Note:

The relevant legislative history materials are collected in *Government in the Sunshine Act--S. 5 (Public Law 94-409--Source Book: Legislative History, Texts and Other Documents (94th Cong., 2d Sess. (1976)),* published jointly by the Committees on Government Operations of the House of Representatives and the Senate.

The provisions of the Act are analyzed and the legislative history discussed in a Conference publication, Richard Berg and Stephen Klitzman, *An Interpretive Guide to the Government in the Sunshine Act* (1978). The *Guide* has been cited in many of the judicial decisions under the Act.

Bibliography:

I. Legislative History

1. See Legislative History and Source Note sections.

II. Other Government Documents

1. Administrative Conference of the U.S., Recommendation 84-3, *Improvements in the Administration of the Government in the Sunshine Act,* 1 CFR §305.84-3 (1992).

2. R. Berg and S. Klitzman, *An Interpretive Guide to the Government in the Sunshine Act* (Administrative Conference of the U.S., 1978).

3. *Hearing on Government in the Sunshine Act Implementation, Before Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary,* 95th Cong., 1st Sess. (1977).

4. *Hearings on Oversight of the Government in the Sunshine Act, Pub. L. No. 94-409, Before Subcommittee on Federal Spending Practices and Open Government of the Senate Committee on Governmental Affairs,* 95th Cong., 2d Sess. (1978).

5. Oversight of the Government in the Sunshine Act, Pub. L. No. 94-409, Before the Subcommittee on Federal Spending Practices and Open Government, 95-1, 95-2 (November 29, 1977, June 13, August 4, 1978).

6. Oversight of the Government in the Sunshine Act, Before the Subcommittee on Federal Spending Budget and Accounting, to review implementation of the Government in the Sunshine Act, 100-2 (April 19, 1988).

7. Government in the Sunshine Act: History and Recent Issues, Before the Senate Committee on Governmental Affairs, 101-1 (November 1989) (reviews legislative history of the Act, recent issues and court rulings affecting the Act, and selected federal agencies' compliance with the Act).

8. D. Welborn, W. Lyons, and L. Thomas, *Implementation and Effects of the Federal Government in the Sunshine Act,* Report to the Administrative Conference of the U.S., 1984 ACUS 199.

III. Other Documents

1. Resolution approved by the American Bar Association House of Delegates, Report No. 100 (February 16-17, 1987) (proposing guidelines to federal agencies and courts with respect to the interpretation of the term "meeting").

Appendix:

1. Government in the Sunshine Act, 5 U.S.C. §552b (1982).

12

Government in the Sunshine Act

Title 5, U.S. Code

§552b. Open meetings

(a) For purposes of this section--

(1) the term "agency" means any agency, as defined in section 552(e) of this title, headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency;

(2) the term "meeting" means the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business, but does not include deliberations required or permitted by subsection (d) or (e); and

(3) the term "member" means an individual who belongs to a collegial body heading an agency.

(b) Members shall not jointly conduct or dispose of agency business other than in accordance with this section. Except as provided in subsection (c), every portion of every meeting of an agency shall be open to public observation.

(c) Except in a case where the agency finds that the public interest requires otherwise, the second sentence of subsection (b) shall not apply to any portion of an agency meeting, and the requirements of subsections (d) and (e) shall not apply to any information pertaining to such meeting otherwise required by this section to be disclosed to the public, where the agency properly determines that such portion or portions of its meeting or the disclosure of such information is likely to--

(1) disclose matters that are (A) specifically authorized under criteria established by an Executive order to be kept secret in the interests of national defense or foreign policy and (B) in fact properly classified pursuant to such Executive order;

(2) relate solely to the internal personnel rules and practices of an agency;

(3) disclose matters specifically exempted from disclosure by statute (other than section 552 of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) involve accusing any person of a crime, or formally censuring any person;

(6) disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

(7) disclose investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, but only to the extent that the production of such records or information would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record

compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) disclose information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;

(9) disclose information the premature disclosure of which would--

(A) in the case of an agency which regulates currencies, securities, commodities, or financial institutions, be likely to (i) lead to significant financial speculation in currencies, securities, or commodities, or (ii) significantly endanger the stability of any financial institution; or

(B) in the case of any agency, be likely to significantly frustrate implementation of a proposed agency action,

except that subparagraph (B) shall not apply in any instance where the agency has already disclosed to the public the content or nature of its proposed action, or where the agency is required by law to make such disclosure on its own initiative prior to taking final agency action on such proposal; or

(10) specifically concern the agency's issuance of a subpena, or the agency's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in section 554 of this title or otherwise involving a determination on the record after opportunity for a hearing.

(d)(1) Action under subsection (c) shall be taken only when a majority of the entire membership of the agency (as defined in subsection (a)(1)) votes to take such action. A separate vote of the agency members shall be taken with respect to each agency meeting a portion or portions of which are proposed to be closed to the public pursuant to subsection (c), or with respect to any information which is proposed to be withheld under subsection (c). A single vote may be taken with respect to a series of meetings, a portion or portions of which are proposed to be closed to the public, or with respect to any information concerning such series of meetings, so long as each meeting in such series involves the same particular matters and is scheduled to be held no more than thirty days after the initial meeting in such series. The vote of each agency member participating in such vote shall be recorded and no proxies shall be allowed.

(2) Whenever any person whose interests may be directly affected by a portion of a meeting requests that the agency close such portion to the public for any of the reasons referred to in paragraph (5), (6), or (7) of subsection (c), the agency, upon request of any one of its members, shall vote by recorded vote whether to close such meeting.

(3) Within one day of any vote taken pursuant to paragraph (1) or (2), the agency shall make publicly available a written copy of such vote reflecting the vote of each member on the question. If a portion of a meeting is to be closed to the public, the agency shall, within one day of the vote taken pursuant to paragraph (1) or (2) of this subsection, make publicly available a full written explanation of its action closing the portion together with a list of all persons expected to attend the meeting and their affiliation.

(4) Any agency, a majority of whose meetings may properly be closed to the public pursuant to paragraph (4), (8), (9)(A), or (10) of subsection (c), or any combination thereof, may provide by regulation for the closing of such meetings or portions thereof in the event that a majority of the members of the agency votes by recorded vote at the beginning of such meeting, or portion thereof, to close the exempt portion or portions of the meeting, and a copy of such vote, reflecting the vote of each member on the question, is made available to the public. The provisions of paragraphs (1), (2), and (3) of this subsection and subsection (e) shall not apply to any portion of a meeting to which such regulations apply: Provided, That the agency shall, except to the extent that such information is exempt from disclosure under the provisions of subsection (c), provide the public with public announcement of the time, place, and subject matter of the meeting and of each portion thereof at the earliest practicable time.

(e)(1) In the case of each meeting, the agency shall make public announcement, at least one week before the meeting, of the time, place, and subject matter of the meeting, whether it is to be open or closed to the public, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting. Such announcement shall be made unless a majority of the members of the agency determines by a recorded vote that agency business requires that such meeting be called at an earlier date, in which case the agency shall make public announcement of the time, place, and subject matter of such meeting, and whether open or closed to the public, at the earliest practicable time.

(2) The time or place of a meeting may be changed following the public announcement required by paragraph (1) only if the agency publicly announces such change at the earliest practicable time. The subject matter of a meeting, or the determination of the agency to open or close a meeting, or portion of a meeting, to the public, may be changed following the public announcement required by this subsection only if (A) a majority of the entire membership of the agency determines by a recorded vote that agency business so requires and that no earlier announcement of the change was possible, and (B) the agency publicly announces such change and the vote of each member upon such change at the earliest practicable time.

(3) Immediately following each public announcement required by this subsection, notice of the time, place, and subject matter of a meeting, whether the meeting is open or closed, any change in one of the preceding, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting, shall also be submitted for publication in the Federal Register.

(f)(1) For every meeting closed pursuant to paragraphs (1) through (10) of subsection (c), the General Counsel or chief legal officer of the agency shall publicly certify that, in his or her opinion, the meeting may be closed to the public and shall state each relevant exemptive provision. A copy of such certification, together with a statement from the presiding officer of the meeting setting forth the time and place of the meeting, and the persons present, shall be retained by the agency. The agency shall maintain a complete transcript or electronic recording adequate to record fully the proceedings of each meeting, or portion of a meeting, closed to the public, except that in the case of a meeting, or portion of a meeting, closed to the public pursuant to paragraph (8), (9)(A), or (10) of subsection (c), the agency shall maintain either such a transcript or recording, or a set of minutes. Such minutes shall fully and clearly describe all matters discussed and shall provide a full and accurate summary of any actions taken, and the reasons therefor, including a description of each of the views expressed on any item and the record of any rollcall vote (reflecting the vote of each member on the question). All documents considered in connection with any action shall be identified in such minutes.

(2) The agency shall make promptly available to the public, in a place easily accessible to the public, the transcript, electronic recording, or minutes (as required by paragraph (1)) of the discussion of any item on the agenda, or of any item of the testimony of any witness received at the meeting, except for such item or items of such discussion or testimony as the agency determines to contain information which may be withheld under subsection (c). Copies of such transcript, or minutes, or a transcription of such recording disclosing the identity of each speaker, shall be furnished to any person at the actual cost of duplication or transcription. The agency shall maintain a complete verbatim copy of the transcript, a complete copy of the minutes, or a complete electronic recording of each meeting, or portion of a meeting, closed to the public, for a period of at least two years after such meeting, or until one year after the conclusion of any agency proceeding with respect to which the meeting or portion was held, whichever occurs later.

(g) Each agency subject to the requirements of this section shall, within 180 days after the date of enactment of this section, following consultation with the Office of the Chairman of the Administrative Conference of the United States and published notice in the Federal Register of at least thirty days and opportunity for written comment by any person, promulgate regulations to implement the requirements of subsections (b) through (f) of this section. Any person may bring a proceeding in the United States District Court for the District of Columbia to require an agency to promulgate such regulations if such agency has not promulgated such regulations within the time period specified herein. Subject to any limitations of time provided by law, any person may bring a proceeding in the United States Court of Appeals for the District of Columbia to set aside agency regulations issued pursuant to this subsection that are not in accord with the requirements of subsections (b) through (f) of this section and to require the promulgation of regulations that are in accord with such subsections.

(h)(1) The district courts of the United States shall have jurisdiction to enforce the requirements of subsections (b) through (f) of this section by declaratory judgment, injunctive relief, or other relief as may be appropriate. Such actions may be brought by any person against an agency prior to, or within sixty days after, the meeting out of which the violation of this section arises, except that if public announcement of such meeting is not initially provided by the agency in accordance with the requirements of this section, such action may be instituted pursuant to this section at any time prior to sixty days after any public announcement of such meeting. Such actions may be brought in the district court of the United States for the district in which the agency meeting is held or in which the agency in question has its headquarters, or in the District Court for the District of Columbia. In such actions a defendant shall serve his answer within thirty days after the service of the complaint. The burden is on the defendant to sustain his action. In deciding such cases the court may examine in camera any portion of the transcript, electronic recording, or minutes of a meeting closed to the public, and may take such additional evidence as it deems necessary. The court, having due regard for orderly administration and the public interest, as well as the interests of the parties, may grant such equitable relief as it deems appropriate, including granting an injunction against future violations of this section or ordering the agency to make available to the public such portion of the transcript, recording, or minutes of a meeting as is not authorized to be withheld under subsection (c) of this section.

(2) Any Federal court otherwise authorized by law to review agency action may, at the application of any person properly participating in the proceeding pursuant to other applicable law, inquire into violations by the agency of the requirements of this section and afford such relief as it deems appropriate. Nothing in this section authorizes any Federal court having jurisdiction solely on the basis of paragraph (1) to set aside, enjoin, or invalidate any agency action (other than an action to close a meeting or to withhold information under this section) taken or discussed at any agency meeting out of which the violation of this section arose.

(i) The court may assess against any party reasonable attorney fees and other litigation costs reasonably incurred by any other party who substantially prevails in any action brought in accordance with the provisions of subsection (g) or (h) of this section, except that costs may be assessed against the plaintiff only where the court finds that the suit was initiated by the plaintiff primarily for frivolous or dilatory purposes. In the case of assessment of costs against an agency, the costs may be assessed by the court against the United States.

(j) Each agency subject to the requirements of this section shall annually report to Congress regarding its compliance with such requirements, including a tabulation of the total number of agency meetings open to the public, the total number of meetings closed to the public, the reasons for closing such meetings, and a description of any litigation brought against the agency under this section, including any costs assessed against the agency in such litigation (whether or not paid by the agency).

(k) Nothing herein expands or limits the present rights of any person under section 552 of this title, except that the exemptions set forth in subsection (c) of this section shall govern in the case of any request made pursuant to section 552 to copy or inspect the transcripts, recordings, or minutes described in subsection (f) of this section. The requirements of chapter 33 of title 44, United States Code, shall not apply to the transcripts, recordings, and minutes described in subsection (f) of this section.

(l) This section does not constitute authority to withhold any information from Congress, and does not authorize the closing of any agency meeting or portion thereof required by any other provision of law to be open.

(m) Nothing in this section authorizes any agency to withhold from any individual any record, including transcripts, recordings, or minutes required by this section, which is otherwise accessible to such individual under section 552a of this title.

(Added Pub. L. No. 94-409, §3(a), Sept. 13, 1976, 90 Stat. 1241.)

Declaration of Policy and Statement of Purpose

Section 2 of Pub. L. No. 94-409 provided that: "It is hereby declared to be the policy of the United States that the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government. It is the purpose of this Act [see Short Title note set out above] to provide the public with such information while protecting the rights of individuals and the ability of the Government to carry out its responsibilities."

National Environmental Policy Act

Citations:

42 U.S.C. §§4321-4347; enacted January 1, 1970 by Pub. L. No. 91-190; 83 Stat. 852.

Lead Agency:

Council on Environmental Quality, Executive Office of the President, 722 Jackson Place NW, Washington, DC 20503 (202) 395-5750.

Overview:

The National Environmental Policy Act (NEPA) was the first federal statute to use the "impact statement" approach in federal regulation. Its purpose was to require federal agencies to analyze and take into account the environmental impact of their actions in an open and public process. The Act also created the Council on Environmental Quality within the Executive Office of the President.

Environmental Impact Statements. The procedural core of NEPA is found in section 102(2)(C) (codified at 42 U.S.C. §4332(2)(C)), which creates the environmental impact statement (EIS) requirement. The provision requires that:

> all agencies of the Federal Government . . . include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--

> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

The provision goes on to require the responsible federal official to consult with and seek comments from other affected agencies. Copies of the statements and relevant comments are required to be made public and to accompany the proposal through the agency review process.

Council on Environmental Quality Role. The Council on Environmental Quality (CEQ), created by title II of the Act, has become the primary overseer of NEPA. In addition to preparing extensive annual environmental quality reports (42 U.S.C. §4341), the Council also has taken the lead in developing appropriate procedures for EIS preparation. The CEQ first was given the authority to issue guidelines to agencies for the preparation of statements in President Nixon's almost-contemporaneous Executive Order 11,514 (March 5, 1970). The CEQ's original guidelines (36 Fed. Reg. 7724-29, April 23, 1971) were nonbinding but were relied upon by most federal agencies when promulgating their own procedures. In 1977 President Carter significantly expanded CEQ's authority by giving it the power to issue binding regulations in Executive Order 11,991 (May 24, 1977). These regulations, issued on November 28, 1978 (43 Fed. Reg. 55978-56007), are codified at 40 CFR Parts 1500-1508. The Supreme Court has since treated these regulations as deserving substantial deference (*Andrus v. Sierra Club*, 442 U.S. 347 (1979)).

The CEQ regulations cover many of the procedural issues that have emerged in the extensive litigation over the meaning of the Act's terms. Comprehensive guidance is provided on what constitutes a "major federal action" requiring an EIS, the preparation of draft, supplemental and final statements, page limits, recommended format and content (all in 40 CFR Part 1502); the comment process (Part 1503), predecision referral of interagency disputes to CEQ (Part 1504); integration with agency decisionmaking (Part 1505); elimination of duplication with state and local requirements and procedures for filing with EPA (Part 1506); and agency compliance (Part 1507).

Although the regulations have been only amended once since their promulgation in 1978[1] the CEQ has continued to provide additional guidance to agencies as interpretive problems arise. In 1981 it published a "Memorandum to Agencies Containing Answers to 40 Most Asked Questions on NEPA Regulations."[2] In April 1981 it issued a "Memorandum for General Counsels, NEPA Liaisons and Participants in Scoping" on the subject of "scoping guidance." And in 1983, after a solicitation of comments on the existing regulations and a 2-year review process, the Council published a supplemental memorandum giving further guidance to agencies.

The CEQ also compiles annual data on the number of environmental impact statements filed by agencies and the trends in NEPA litigation.[3]

Legislative History:

S. 1075, the original NEPA legislation, was introduced by Senators Jackson and Stevens on February 18, 1969. It authorized the Secretary of the Interior to conduct a research program on environmental problems and created the Council on Environmental Quality. A hearing was held April 16, 1969 during which witnesses (primarily Lynton Caldwell, professor of political science at Indiana University) urged the creation of an "action-forcing" mechanism, which later became the environmental impact statement. S. 1075 was reported with amendments and the accompanying report of the Senate Committee on Interior and

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[1] The amendment modified 40 CFR 1502.22, dealing with incomplete or unavailable information, 51 Fed. Reg. 15625 (April 25, 1986).

[2] The modification to the regulations, *id.*, in effect rescinded the answer to Question #20.

[3] See Council on Environmental Quality, *Environmental Quality 1990* 395 (Table B-6b, showing 370 EISs filed in 1989), and the number of NEPA-based lawsuits filed (*id.*, at page 395 (showing 91 cases filed in 1988)).

Insular Affairs on July 9, 1969. The following day the bill passed the Senate unanimously.

In the House of Representatives a series of hearings was held during May and June 1969 by a subcommittee of the Committee on Merchant Marine and Fisheries on various related bills. On July 1, 1969, Representative Dingell and others introduced H.R. 12,549, which became the leading House bill. It, however, lacked the impact statement requirement. On July 11, 1969, H.R. 12,549 was reported by the full Committee. A supplemental report was filed on July 19. On September 23, 1969 the House passed the Senate bill, but only after substituting for its language the text of the House bill. It then requested a conference.

On October 8, 1969, after listening to Senator Jackson address the differences between the two versions, the Senate voted to insist on its version and appointed conferees. On December 17, 1969 the conference committee reported out a substitute version of S. 1075. This compromise version accepted the Senate's environmental impact statement requirement, adding the language "to the fullest extent possible." That same day, the Senate approved the Conference Report. The House followed suit on December 23. The bill became Pub. L. No. 91-190 on January 1, 1970.

Source Note:

There is an extensive literature of commentary, criticism and analysis of NEPA and its implementation. Of course, the most authoritative pronouncements emanate from the Council on Environmental Quality. A selection of various books and articles on diverse aspects of NEPA practice and procedure is included in the Bibliography.

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National Environmental Policy Act

Title 42, U.S. Code

§4321. Congressional declaration of purpose.

Subchapter I Policies and Goals

§4331. Congressional declaration of national environmental policy.
§4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts.
§4333. Conformity of administrative procedures to national environmental policy.
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Subchapter II Council on Environmental Quality

§4341. Reports to Congress; recommendations for legislation.
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§4321. Congressional declaration of purpose

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.
(Pub. L. No. 91-190, §2, Jan. 1, 1970, 83 Stat. 852.)

§4331. Congressional declaration of national environmental policy

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may--

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

(Pub. L. No. 91-190, title I, §101, Jan. 1, 1970, 83 Stat. 852.)

§4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall--

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisonmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on–

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.[1]

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

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[1] So in original. The period probably should be a semicolon.

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

(Pub. L. No. 91-190, title I, §102, Jan. 1, 1970, 83 Stat. 853; Pub. L. No. 94-83, Aug. 9, 1975, 89 Stat. 424.)

§4333. Conformity of administrative procedures to national environmental policy

All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this chapter and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this chapter.

(Pub. L. No. 91-190, title I, §103, Jan. 1, 1970, 83 Stat. 854.)

§4334. Other statutory obligations of agencies

Nothing in section 4332 or 4333 of this title shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

(Pub. L. No. 91-190, title I, §104, Jan. 1, 1970, 83 Stat. 854.)

§4335. Efforts supplemental to existing authorizations

The policies and goals set forth in this chapter are supplementary to those set forth in existing authorizations of Federal agencies.

(Pub. L. No. 91-190, title I, §105, Jan. 1, 1970, 83 Stat. 854.)

§4341. Reports to Congress; recommendations for legislation

The President shall transmit to the Congress annually beginning July 1, 1970, an Environmental Quality Report (hereinafter referred to as the "report") which shall set forth (1) the status and condition of the major natural, manmade, or altered environmental classes of the Nation, including, but not limited to, the air, the aquatic, including marine, estuarine, and fresh water, and the terrestrial

environment, including, but not limited to, the forest, dryland, wetland, range, urban, suburban, and rural environment; (2) current and foreseeable trends in the quality, management and utilization of such environments and the effects of those trends on the social, economic, and other requirements of the Nation; (3) the adequacy of available natural resources for fulfilling human and economic requirements of the Nation in the light of expected population pressures; (4) a review of the programs and activities (including regulatory activities) of the Federal Government, the State and local governments, and nongovernmental entities or individuals, with particular reference to their effect on the environment and on the conservation, development and utilization of natural resources; and (5) a program for remedying the deficiencies of existing programs and activities, together with recommendations for legislation.
(Pub. L. No. 91-190, title II, §201, Jan. 1, 1970, 83 Stat. 854.)

§4342. Establishment; membership; Chairman; appointments

There is created in the Executive Office of the President a Council on Environmental Quality (hereinafter referred to as the "Council"). The Council shall be composed of three members who shall be appointed by the President to serve at his pleasure, by and with the advice and consent of the Senate. The President shall designate one of the members of the Council to serve as Chairman. Each member shall be a person who, as a result of his training, experience, and attainments, is exceptionally well qualified to analyze and interpret environmental trends and information of all kinds; to appraise programs and activities of the Federal Government in the light of the policy set forth in subchapter I of this chapter; to be conscious of and responsive to the scientific, economic, social, esthetic, and cultural needs and interests of the Nation; and to formulate and recommend national policies to promote the improvement of the quality of the environment.
(Pub. L. No. 91-190, title II, §202, Jan. 1, 1970, 83 Stat. 854.)

§4343. Employment of personnel, experts and consultants

(a) The Council may employ such officers and employees as may be necessary to carry out its functions under this chapter. In addition, the Council may employ and fix the compensation of such experts and consultants as may be necessary for the carrying out of its functions under this chapter, in accordance with section 3109 of title 5 (but without regard to the last sentence thereof).

(b) Notwithstanding section 1342 of title 31, the Council may accept and employ voluntary and uncompensated services in furtherance of the purposes of the Council.
(Pub. L. No. 91-190, title II, §203, Jan. 1, 1970, 83 Stat. 855; Pub. L. No. 94-52, §2, July 3, 1975, 89 Stat. 258.)

§4344. Duties and functions

It shall be the duty and function of the Council--

(1) to assist and advise the President in the preparation of the Environmental Quality Report required by section 4341 of this title;

(2) to gather timely and authoritative information concerning the conditions and trends in the quality of the environment both current and prospective, to analyze and interpret such information for the purpose of determining whether such conditions and trends are interfering, or are likely to interfere, with the achievement of the policy set forth in subchapter I of this chapter, and to compile and submit to the President studies relating to such conditions and trends;

(3) to review and appraise the various programs and activities of the Federal Government in the light of the policy set forth in subchapter I of this chapter for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy, and to make recommendations to the President with respect thereto;

(4) to develop and recommend to the President national policies to foster and promote the improvement of environmental quality to meet the conservation, social, economic, health, and other requirements and goals of the Nation;

(5) to conduct investigations, studies, surveys, research, and analyses relating to ecological systems and environmental quality;

(6) to document and define changes in the natural environment, including the plant and animal systems, and to accumulate necessary data and other information for a continuing analysis of these changes or trends and an interpretation of their underlying causes;

(7) to report at least once each year to the President on the state and condition of the environment; and

(8) to make and furnish such studies, reports thereon, and recommendations with respect to matters of policy and legislation as the President may request.

(Pub. L. No. 91-190, title II, §204, Jan. 1, 1970, 83 Stat. 855.)

§4345. Consultation with Citizens' Advisory Committee on Environmental Quality and other representatives

In exercising its powers, functions, and duties under this chapter, the Council shall--

(1) consult with the Citizens' Advisory Committee on Environmental Quality established by Executive Order numbered 11472, dated May 29, 1969, and with such representatives of science, industry, agriculture, labor, conservation organizations, State and local governments and other groups, as it deems advisable; and

(2) utilize, to the fullest extent possible, the services, facilities, and information (including statistical information) of public and private agencies and organizations, and individuals, in order that duplication of effort and expense may be avoided, thus assuring that the Council's activities will not unnecessarily overlap or conflict with similar activities authorized by law and performed by established agencies.

(Pub. L. No. 91-190, title II, §205, Jan. 1, 1970, 83 Stat. 855.)

§4346. Tenure and compensation of members

Members of the Council shall serve full time and the Chairman of the Council shall be compensated at the rate provided for Level II of the Executive Schedule Pay Rates (5 U.S.C. 5313). The other members of the Council shall be

compensated at the rate provided for Level IV or the Executive Schedule Pay Rates (5 U.S.C. 5315).
(Pub. L. No. 91-190, title II, §206, Jan. 1, 1970, 83 Stat. 856.)

§4346a. Travel reimbursement by private organizations and Federal, State, and local governments

The Council may accept reimbursements from any private nonprofit organization or from any department, agency, or instrumentality of the Federal Government, any State, or local government, for the reasonable travel expenses incurred by an officer or employee of the Council in connection with his attendance at any conference, seminar, or similar meeting conducted for the benefit of the Council.
(Pub. L. No. 91-190, title II, §207, as added Pub. L. No. 94-52, §3, July 3, 1975, 89 Stat. 258.)

§4346b. Expenditures in support of international activities

The Council may make expenditures in support of its international activities, including expenditures for: (1) international travel; (2) activities in implementation of international agreements; and (3) the support of international exchange programs in the United States and in foreign countries.
(Pub. L. No. 91-190, title II, §208, as added Pub. L. No. 94-52, §3, July 3, 1975, 89 Stat. 258.)

§4347. Authorization of appropriations

There are authorized to be appropriated to carry out the provisions of this chapter not to exceed $300,000 for fiscal year 1970, $700,000 for fiscal year 1971, and $1,000,000 for each fiscal year thereafter.
(Pub. L. No. 91-190, title II, §209, formerly §207, Jan. 1, 1970, 83 Stat. 856, renumbered §209, Pub. L. No. 94-52, §3, July 3, 1975, 89 Stat. 258.)

Council on Environmental Quality Regulations
40 CFR Parts 1500-1508

PART 1500—PURPOSE, POLICY, AND MANDATE

Sec.
1500.1 Purpose.
1500.2 Policy.
1500.3 Mandate.
1500.4 Reducing paperwork.
1500.5 Reducing delay.
1500.6 Agency authority.

Authority: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609) and E.O. 11514, Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

Source: 43 FR 55990, Nov. 28, 1978, unless otherwise noted.

§ 1500.1 Purpose.

(a) The National Environmental Policy Act (NEPA) is our basic national charter for protection of the environment. It establishes policy, sets goals (section 101), and provides means (section 102) for carrying out the policy. Section 102(2) contains "action-forcing" provisions to make sure that federal agencies act according to the letter and spirit of the Act. The regulations that follow implement section 102(2). Their purpose is to tell federal agencies what they must do to comply with the procedures and achieve the goals of the Act. The President, the federal agencies, and the courts share responsibility for enforcing the Act so as to achieve the substantive requirements of section 101.

(b) NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail.

(c) Ultimately, of course, it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment. These regulations provide the direction to achieve this purpose.

§ 1500.2 Policy.

Federal agencies shall to the fullest extent possible:

(a) Interpret and administer the policies, regulations, and public laws of the United States in accordance with the policies set forth in the Act and in these regulations.

(b) Implement procedures to make the NEPA process more useful to decisionmakers and the public; to reduce paperwork and the accumulation of extraneous background data; and to emphasize real environmental issues and alternatives. Environmental impact statements shall be concise, clear, and to the point, and shall be supported by evidence that agencies have made the necessary environmental analyses.

(c) Integrate the requirements of NEPA with other planning and environmental review procedures required by law or by agency practice so that all such procedures run concurrently rather than consecutively.

(d) Encourage and facilitate public involvement in decisions which affect the quality of the human environment.

(e) Use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment.

(f) Use all practicable means, consistent with the requirements of the Act and other essential considerations of national policy, to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment.

§ 1500.3 Mandate.

Parts 1500 through 1508 of this title provide regulations applicable to and binding on all Federal agencies for implementing the procedural provisions of the National Environmental Policy Act of 1969, as amended (Pub. L. 91-190, 42 U.S.C. 4321 et seq.) (NEPA or the Act) except where compliance would be inconsistent with other statutory requirements. These regulations are issued pursuant to NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.) section 309 of the Clean Air Act, as amended (42 U.S.C. 7609) and Executive Order 11514, Protection and Enhancement of Environmental Quality (March 5, 1970, as amended by Executive Order 11991, May 24, 1977). These regulations, unlike the predecessor guidelines, are not confined to sec. 102(2)(C) (environmental impact statements). The regulations apply to the whole of section 102(2). The provisions of the Act and of these regulations must be read together as a whole in order to comply with the spirit and letter of the law. It is the Council's intention that judicial review of agency compliance with these regulations not occur before an agency has filed the final environmental impact statement, or has made a final finding of no significant impact (when such a finding will result in action affecting the environment), or takes action that will result in irreparable injury. Furthermore, it is the Council's intention that any trivial violation of these regulations not give rise to any independent cause of action.

§ 1500.4 Reducing paperwork.

Agencies shall reduce excessive paperwork by:

(a) Reducing the length of environmental impact statements (§ 1502.2(c)), by means such as setting appropriate page limits (§§ 1501.7(b)(1) and 1502.7).

(b) Preparing analytic rather than encyclopedic environmental impact statements (§ 1502.2(a)).

(c) Discussing only briefly issues other than significant ones (§ 1502.2(b)).

(d) Writing environmental impact statements in plain language (§ 1502.8).

(e) Following a clear format for environmental impact statements (§ 1502.10).

(f) Emphasizing the portions of the environmental impact statement that are useful to decisionmakers and the public (§§ 1502.14 and 1502.15) and reducing emphasis on background material (§ 1502.16).

(g) Using the scoping process, not only to identify significant environmental issues deserving of study, but also to deemphasize insignificant issues, narrowing the scope of the environmental impact statement process accordingly (§ 1501.7).

(h) Summarizing the environmental impact statement (§ 1502.12) and circulating the summary instead of the entire environmental impact statement if the latter is unusually long (§ 1502.19).

(i) Using program, policy, or plan environmental impact statements and tiering from statements of broad scope to those of narrower scope, to eliminate repetitive discussions of the same issues (§§ 1502.4 and 1502.20).

(j) Incorporating by reference (§ 1502.21).

(k) Integrating NEPA requirements with other environmental review and consultation requirements (§ 1502.25).

(l) Requiring comments to be as specific as possible (§ 1503.3).

(m) Attaching and circulating only changes to the draft environmental impact statement, rather than rewriting and circulating the entire statement when changes are minor (§ 1503.4(c)).

(n) Eliminating duplication with State and local procedures, by providing for joint preparation (§ 1506.2), and with other Federal procedures, by providing that an agency may adopt appropriate environmental documents prepared by another agency (§ 1506.3).

(o) Combining environmental documents with other documents (§ 1506.4).

(p) Using categorical exclusions to define categories of actions which do not individually or cumulatively have a significant effect on the human environment and which are therefore exempt from requirements to prepare an environmental impact statement (§ 1508.4).

(q) Using a finding of no significant impact when an action not otherwise excluded will not have a significant effect on the human environment and is therefore exempt from requirements to prepare an environmental impact statement (§ 1508.13).

[43 FR 55990, Nov. 29, 1978; 44 FR 873, Jan. 3, 1979]

§ 1500.5 Reducing delay.

Agencies shall reduce delay by:

(a) Integrating the NEPA process into early planning (§ 1501.2).

(b) Emphasizing interagency cooperation before the environmental impact statement is prepared, rather than submission of adversary comments on a completed document (§ 1501.6).

(c) Insuring the swift and fair resolution of lead agency disputes (§ 1501.5).

(d) Using the scoping process for an early identification of what are and what are not the real issues (§ 1501.7).

(e) Establishing appropriate time limits for the environmental impact statement process (§§ 1501.7(b)(2) and 1501.8).

(f) Preparing environmental impact statements early in the process (§ 1502.5).

(g) Integrating NEPA requirements with other environmental review and consultation requirements (§ 1502.25).

(h) Eliminating duplication with State and local procedures by providing for joint preparation (§ 1506.2) and with other Federal procedures by providing that an agency may adopt appropriate environmental documents prepared by another agency (§ 1506.3).

(i) Combining environmental documents with other documents (§ 1506.4).

(j) Using accelerated procedures for proposals for legislation (§ 1506.8).

(k) Using categorical exclusions to define categories of actions which do not individually or cumulatively have a significant effect on the human environment (§ 1508.4) and which are therefore exempt from requirements to prepare an environmental impact statement.

(l) Using a finding of no significant impact when an action not otherwise excluded will not have a significant effect on the human environment (§ 1508.13) and is therefore exempt from requirements to prepare an environmental impact statement.

§ 1500.6 Agency authority.

Each agency shall interpret the provisions of the Act as a supplement to its existing authority and as a mandate to view traditional policies and missions in the light of the Act's national environmental objectives. Agencies shall review their policies, procedures, and regulations accordingly and revise them as necessary to insure full compliance with the purposes and provisions of the Act. The phrase "to the fullest extent possible" in section 102 means that each agency of the Federal Government shall comply with that section unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible.

PART 1501—NEPA AND AGENCY PLANNING

Sec.

1501.1 Purpose.
1501.2 Apply NEPA early in the process.
1501.3 When to prepare an environmental assessment.
1501.4 Whether to prepare an environmental impact statement.
1501.5 Lead agencies.
1501.6 Cooperating agencies.
1501.7 Scoping.
1501.8 Time limits.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609, and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 55992, Nov. 29, 1978, unless otherwise noted.

§ 1501.1 Purpose.

The purposes of this part include:

(a) Integrating the NEPA process into early planning to insure appropriate consideration of NEPA's policies and to eliminate delay.

(b) Emphasizing cooperative consultation among agencies before the environmental impact statement is prepared rather than submission of adversary comments on a completed document.

(c) Providing for the swift and fair resolution of lead agency disputes.

(d) Identifying at an early stage the significant environmental issues deserving of study and deemphasizing insignificant issues, narrowing the scope of the environmental impact statement accordingly.

(e) Providing a mechanism for putting appropriate time limits on the environmental impact statement process.

§ 1501.2 Apply NEPA early in the process.

Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts. Each agency shall:

(a) Comply with the mandate of section 102(2)(A) to "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment," as specified by § 1507.2.

(b) Identify environmental effects and values in adequate detail so they can be compared to economic and technical analyses. Environmental documents and appropriate analyses shall be circulated and reviewed at the same time as other planning documents.

(c) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources as provided by section 102(2)(E) of the Act.

(d) Provide for cases where actions are planned by private applicants or other non-Federal entities before Federal involvement so that:

(1) Policies or designated staff are available to advise potential applicants of studies or other information foreseeably required for later Federal action.

(2) The Federal agency consults early with appropriate State and local agencies and Indian tribes and with interested private persons and organizations when its own involvement is reasonably foreseeable.

(3) The Federal agency commences its NEPA process at the earliest possible time.

§ 1501.3 When to prepare an environmental assessment.

(a) Agencies shall prepare an environmental assessment (§ 1508.9) when necessary under the procedures adopted by individual agencies to supplement these regulations as described in § 1507.3. An assessment is not necessary if the agency has decided to prepare an environmental impact statement.

(b) Agencies may prepare an environmental assessment on any action at any time in order to assist agency planning and decisionmaking.

§ 1501.4 Whether to prepare an environmental impact statement.

In determining whether to prepare an environmental impact statement the Federal agency shall:

(a) Determine under its procedures supplementing these regulations (described in § 1507.3) whether the proposal is one which:

(1) Normally requires an environmental impact statement, or

(2) Normally does not require either an environmental impact statement or an environmental assessment (categorical exclusion).

(b) If the proposed action is not covered by paragraph (a) of this section, prepare an environmental assessment (§ 1508.9). The agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments required by § 1508.9(a)(1).

(c) Based on the environmental assessment make its determination whether to prepare an environmental impact statement.

(d) Commence the scoping process (§ 1501.7), if the agency will prepare an environmental impact statement.

(e) Prepare a finding of no significant impact (§ 1508.13), if the agency determines on the basis of the environmental assessment not to prepare a statement.

(1) The agency shall make the finding of no significant impact available

to the affected public as specified in § 1506.6.

(2) In certain limited circumstances, which the agency may cover in its procedures under § 1507.3, the agency shall make the finding of no significant impact available for public review (including State and areawide clearinghouses) for 30 days before the agency makes its final determination whether to prepare an environmental impact statement and before the action may begin. The circumstances are:

(i) The proposed action is, or is closely similar to, one which normally requires the preparation of an environmental impact statement under the procedures adopted by the agency pursuant to § 1507.3, or

(ii) The nature of the proposed action is one without precedent.

§ 1501.5 Lead agencies.

(a) A lead agency shall supervise the preparation of an environmental impact statement if more than one Federal agency either:

(1) Proposes or is involved in the same action; or

(2) Is involved in a group of actions directly related to each other because of their functional interdependence or geographical proximity.

(b) Federal, State, or local agencies, including at least one Federal agency, may act as joint lead agencies to prepare an environmental impact statement (§ 1506.2).

(c) If an action falls within the provisions of paragraph (a) of this section the potential lead agencies shall determine by letter or memorandum which agency shall be the lead agency and which shall be cooperating agencies. The agencies shall resolve the lead agency question so as not to cause delay. If there is disagreement among the agencies, the following factors (which are listed in order of descending importance) shall determine lead agency designation:

(1) Magnitude of agency's involvement.

(2) Project approval/disapproval authority.

(3) Expertise concerning the action's environmental effects.

(4) Duration of agency's involvement.

(5) Sequence of agency's involvement.

(d) Any Federal agency, or any State or local agency or private person substantially affected by the absence of lead agency designation, may make a written request to the potential lead agencies that a lead agency be designated.

(e) If Federal agencies are unable to agree on which agency will be the lead agency or if the procedure described in paragraph (c) of this section has not resulted within 45 days in a lead agency designation, any of the agencies or persons concerned may file a request with the Council asking it to determine which Federal agency shall be the lead agency.

A copy of the request shall be transmitted to each potential lead agency. The request shall consist of:

(1) A precise description of the nature and extent of the proposed action.

(2) A detailed statement of why each potential lead agency should or should not be the lead agency under the criteria specified in paragraph (c) of this section.

(f) A response may be filed by any potential lead agency concerned within 20 days after a request is filed with the Council. The Council shall determine as soon as possible but not later than 20 days after receiving the request and all responses to it which Federal agency shall be the lead agency and which other Federal agencies shall be cooperating agencies.

[43 FR 55992, Nov. 29, 1978; 44 FR 873, Jan. 3, 1979]

§ 1501.6 Cooperating agencies.

The purpose of this section is to emphasize agency cooperation early in the NEPA process. Upon request of the lead agency, any other Federal agency which has jurisdiction by law shall be a cooperating agency. In addition any other Federal agency which has special expertise with respect to any environmental issue, which should be addressed in the statement may be a cooperating agency upon request of the lead agency. An agency may request the lead agency to designate it a cooperating agency.

(a) The lead agency shall:

(1) Request the participation of each cooperating agency in the NEPA process at the earliest possible time.

(2) Use the environmental analysis and proposals of cooperating agencies with jurisdiction by law or special expertise, to the maximum extent possible consistent with its responsibility as lead agency.

(3) Meet with a cooperating agency at the latter's request.

(b) Each cooperating agency shall:

(1) Participate in the NEPA process at the earliest possible time.

(2) Participate in the scoping process (described below in § 1501.7).

(3) Assume on request of the lead agency responsibility for developing information and preparing environmental analyses including portions of the environmental impact statement concerning which the cooperating agency has special expertise.

(4) Make available staff support at the lead agency's request to enhance the latter's interdisciplinary capability.

(5) Normally use its own funds. The lead agency shall, to the extent available funds permit, fund those major activities or analyses it requests from cooperating agencies. Potential lead agencies shall include such funding requirements in their budget requests.

(c) A cooperating agency may in response to a lead agency's request for assistance in preparing the environmental impact statement (described in paragraph (b)(3), (4), or (5) of this section) reply that other program commitments preclude any involvement or the degree of involvement requested in the action that is the subject of the environmental impact statement. A copy of this reply shall be submitted to the Council.

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§ 1501.7 Scoping.

There shall be an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action. This process shall be termed scoping. As soon as practicable after its decision to prepare an environmental impact statement and before the scoping process the lead agency shall publish a notice of intent (§ 1508.22) in the FEDERAL REGISTER except as provided in § 1507.3(e).

(a) As part of the scoping process the lead agency shall:

(1) Invite the participation of affected Federal, State, and local agencies, any affected Indian tribe, the proponent of the action, and other interested persons (including those who might not be in accord with the action on environmental grounds), unless there is a limited exception under § 1507.3(c). An agency may give notice in accordance with § 1506.6.

(2) Determine the scope (§ 1508.25) and the significant issues to be analyzed in depth in the environmental impact statement.

(3) Identify and eliminate from detailed study the issues which are not significant or which have been covered by prior environmental review (§ 1506.3), narrowing the discussion of these issues in the statement to a brief presentation of why they will not have a significant effect on the human environment or providing a reference to their coverage elsewhere.

(4) Allocate assignments for preparation of the environmental impact statement among the lead and cooperating agencies, with the lead agency retaining responsibility for the statement.

(5) Indicate any public environmental assessments and other environmental impact statements which are being or will be prepared that are related to but are not part of the scope of the impact statement under consideration.

(6) Identify other environmental review and consultation requirements so the lead and cooperating agencies may prepare other required analyses and studies concurrently with, and integrated with, the environmental impact statement as provided in § 1502.25.

(7) Indicate the relationship between the timing of the preparation of environmental analyses and the agency's tentative planning and decisionmaking schedule.

(b) As part of the scoping process the lead agency may:

(1) Set page limits on environmental documents (§ 1502.7).

(2) Set time limits (§ 1501.8).

(3) Adopt procedures under § 1507.3 to combine its environmental assessment process with its scoping process.

(4) Hold an early scoping meeting or meetings which may be integrated with any other early planning meeting the agency has. Such a scoping meeting will often be appropriate when the impacts of a particular action are confined to specific sites.

(c) An agency shall revise the determinations made under paragraphs (a) and (b) of this section if substantial changes are made later in the proposed action, or if significant new circumstances or information arise which bear on the proposal or its impacts.

§ 1501.8 Time limits.

Although the Council has decided that prescribed universal time limits for the entire NEPA process are too inflexible, Federal agencies are encouraged to set time limits appropriate to individual actions (consistent with the time intervals required by § 1506.10). When multiple agencies are involved the reference to agency below means lead agency.

(a) The agency shall set time limits if an applicant for the proposed action requests them: *Provided,* That the limits are consistent with the purposes of NEPA and other essential considerations of national policy.

(b) The agency may:

(1) Consider the following factors in determining time limits:

(i) Potential for environmental harm.

(ii) Size of the proposed action.

(iii) State of the art of analytic techniques.

(iv) Degree of public need for the proposed action, including the consequences of delay.

(v) Number of persons and agencies affected.

(vi) Degree to which relevant information is known and if not known the time required for obtaining it.

(vii) Degree to which the action is controversial.

(viii) Other time limits imposed on the agency by law, regulations, or executive order.

(2) Set overall time limits or limits for each constituent part of the NEPA process, which may include:

(i) Decision on whether to prepare an environmental impact statement (if not already decided).

(ii) Determination of the scope of the environmental impact statement.

(iii) Preparation of the draft environmental impact statement.

(iv) Review of any comments on the draft environmental impact statement from the public and agencies.

(v) Preparation of the final environmental impact statement.

(vi) Review of any comments on the final environmental impact statement.

(vii) Decision on the action based in part on the environmental impact statement.

(3) Designate a person (such as the project manager or a person in the agency's office with NEPA responsibilities) to expedite the NEPA process.

(c) State or local agencies or members of the public may request a Federal Agency to set time limits.

PART 1502—ENVIRONMENTAL IMPACT STATEMENT

Sec.

1502.1 Purpose.
1502.2 Implementation.
1502.3 Statutory requirements for statements.
1502.4 Major Federal actions requiring the preparation of environmental impact statements.
1502.5 Timing.
1502.6 Interdisciplinary preparation.
1502.7 Page limits.
1502.8 Writing.
1502.9 Draft, final, and supplemental statements.
1502.10 Recommended format.
1502.11 Cover sheet.
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1502.13 Purpose and need.
1502.14 Alternatives including the proposed action.
1502.15 Affected environment.
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1502.17 List of preparers.
1502.18 Appendix.
1502.19 Circulation of the environmental impact statement.
1502.20 Tiering.
1502.21 Incorporation by reference.
1502.22 Incomplete or unavailable information.

Sec.
1502.23 Cost-benefit analysis.
1502.24 Methodology and scientific accuracy.
1502.25 Environmental review and consultation requirements.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 55994, Nov. 29, 1978, unless otherwise noted.

§ 1502.1 Purpose.

The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government. It shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment. Agencies shall focus on significant environmental issues and alternatives and shall reduce paperwork and the accumulation of extraneous background data. Statements shall be concise, clear, and to the point, and shall be supported by evidence that the agency has made the necessary environmental analyses. An environmental impact statement is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions.

§ 1502.2 Implementation.

To achieve the purposes set forth in § 1502.1 agencies shall prepare environmental impact statements in the following manner:

(a) Environmental impact statements shall be analytic rather than encyclopedic.

(b) Impacts shall be discussed in proportion to their significance. There shall be only brief discussion of other than significant issues. As in a finding of no significant impact, there should be only enough discussion to show why more study is not warranted.

(c) Environmental impact statements shall be kept concise and shall be no longer than absolutely necessary to comply with NEPA and with these regulations. Length should vary first with potential environmental problems and then with project size.

(d) Environmental impact statements shall state how alternatives considered in it and decisions based on it will or will not achieve the requirements of sections 101 and 102(1) of the Act and other environmental laws and policies.

(e) The range of alternatives discussed in environmental impact statements shall encompass those to be considered by the ultimate agency decisionmaker.

(f) Agencies shall not commit resources prejudicing selection of alternatives before making a final decision (§ 1506.1).

(g) Environmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.

§ 1502.3 Statutory requirements for statements.

As required by sec. 102(2)(C) of NEPA environmental impact statements (§ 1508.11) are to be included in every recommendation or report.

On proposals (§ 1508.23).

For legislation and (§ 1508.17).

Other major Federal actions (§ 1508.18).

Significantly (§ 1508.27).

Affecting (§§ 1508.3, 1508.8).

The quality of the human environment (§ 1508.14).

§ 1502.4 Major Federal actions requiring the preparation of environmental impact statements.

(a) Agencies shall make sure the proposal which is the subject of an environmental impact statement is properly defined. Agencies shall use the criteria for scope (§ 1508.25) to determine which proposal(s) shall be the subject of a particular statement. Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement.

(b) Environmental impact statements may be prepared, and are sometimes required, for broad Federal actions such as the adoption of new agency programs or regulations (§ 1508.18). Agencies shall prepare statements on broad actions so that they are relevant to policy and are timed to coincide with meaningful points in agency planning and decisionmaking.

(c) When preparing statements on broad actions (including proposals by more than one agency), agencies may find it useful to evaluate the proposal(s) in one of the following ways:

(1) Geographically, including actions occurring in the same general location, such as body of water, region, or metropolitan area.

(2) Generically, including actions which have relevant similarities, such as common timing, impacts, alternatives, methods of implementation, media, or subject matter.

(3) By stage of technological development including federal or federally assisted research, development or demonstration programs for new technologies which, if applied, could significantly affect the quality of the human environment. Statements shall be prepared on such programs and shall be available before the program has reached a stage of investment or commitment to implementation likely to determine subsequent development or restrict later alternatives.

(d) Agencies shall as appropriate employ scoping (§ 1501.7), tiering (§ 1502.20), and other methods listed in §§ 1500.4 and 1500.5 to relate broad and narrow actions and to avoid duplication and delay.

§ 1502.5 Timing.

An agency shall commence preparation of an environmental impact statement as close as possible to the time the agency is developing or is presented with a proposal (§ 1508.23) so that preparation can be completed in time for the final statement to be included in any recommendation or report on the proposal. The statement shall be prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made (§§ 1500.2(c), 1501.2, and 1502.2). For instance:

(a) For projects directly undertaken by Federal agencies the environmental impact statement shall be prepared at the feasibility analysis (go-no go) stage and may be supplemented at a later stage if necessary.

(b) For applications to the agency appropriate environmental assessments or statements shall be commenced no later than immediately after the application is received. Federal agencies are encouraged to begin preparation of such assessments or statements earlier, preferably jointly with applicable State or local agencies.

(c) For adjudication, the final environmental impact statement shall normally precede the final staff recommendation and that portion of the public hearing related to the impact study. In appropriate circumstances the statement may follow preliminary hearings designed to gather information for use in the statements.

(d) For informal rulemaking the draft environmental impact statement shall normally accompany the proposed rule.

§ 1502.6 Interdisciplinary preparation.

Environmental impact statements shall be prepared using an inter-disciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts (section 102(2)(A) of the Act). The disciplines of the preparers shall be appropriate to the scope and issues identified in the scoping process (§ 1501.7).

§ 1502.7 Page limits.

The text of final environmental impact statements (e.g., paragraphs (d) through (g) of § 1502.10) shall normally be less than 150 pages and for proposals of unusual scope or complexity shall normally be less than 300 pages.

§ 1502.8 Writing.

Environmental impact statements shall be written in plain language and may use appropriate graphics so that decisionmakers and the public can readily understand them. Agencies should employ writers of clear prose or editors to write, review, or edit statements, which will be based upon the analysis and supporting data from the natural and social sciences and the environmental design arts.

§ 1502.9 Draft, final, and supplemental statements.

Except for proposals for legislation as provided in § 1506.8 environmental impact statements shall be prepared in two stages and may be supplemented.

(a) Draft environmental impact statements shall be prepared in accordance with the scope decided upon in the scoping process. The lead agency shall work with the cooperating agencies and shall obtain comments as required in part 1503 of this chapter. The draft statement must fulfill and satisfy to the fullest extent possible the requirements established for final statements in section 102(2)(C) of the Act. If a draft statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and circulate a revised draft of the appropriate portion. The agency shall make every effort to disclose and discuss at appropriate points in the draft statement all major points of view on the environmental impacts of the alternatives including the proposed action.

(b) Final environmental impact statements shall respond to comments as required in part 1503 of this chapter. The agency shall discuss at appropriate points in the final statement any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised.

(c) Agencies:

(1) Shall prepare supplements to either draft or final environmental impact statements if:

(i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or

(ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

(2) May also prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so.

(3) Shall adopt procedures for introducing a supplement into its formal administrative record, if such a record exists.

(4) Shall prepare, circulate, and file a supplement to a statement in the same fashion (exclusive of scoping) as a draft and final statement unless alternative procedures are approved by the Council.

§ 1502.10 Recommended format.

Agencies shall use a format for environmental impact statements which will encourage good analysis and clear presentation of the alternatives including the proposed action. The following standard format for environmental impact statements should be followed unless the agency determines that there is a compelling reason to do otherwise:

(a) Cover sheet.

(b) Summary.

(c) Table of contents.

(d) Purpose of and need for action.

(e) Alternatives including proposed action (sections 102(2)(C)(iii) and 102(2)(E) of the Act).

(f) Affected environment.

(g) Environmental consequences (especially sections 102(2)(C)(i), (ii), (iv), and (v) of the Act).

(h) List of preparers.

(i) List of Agencies, Organizations, and persons to whom copies of the statement are sent.

(j) Index.

(k) Appendices (if any).

If a different format is used, it shall include paragraphs (a), (b), (c), (h), (i), and (j), of this section and shall include the substance of paragraphs (d), (e), (f), (g), and (k) of this section, as further described in §§ 1502.11 through 1502.18, in any appropriate format.

§ 1502.11 Cover sheet.

The cover sheet shall not exceed one page. It shall include:

(a) A list of the responsible agencies including the lead agency and any cooperating agencies.

(b) The title of the proposed action that is the subject of the statement (and if appropriate the titles of related cooperating agency actions), together with the State(s) and county(ies) (or other jurisdiction if applicable) where the action is located.

(c) The name, address, and telephone number of the person at the agency who can supply further information.

(d) A designation of the statement as a draft, final, or draft or final supplement.

(e) A one paragraph abstract of the statement.

(f) The date by which comments must be received (computed in cooperation with EPA under § 1506.10).

The information required by this section may be entered on Standard Form 424 (in items 4, 6, 7, 10, and 18).

§ 1502.12 Summary.

Each environmental impact statement shall contain a summary which adequately and accurately summarizes the statement. The summary shall stress the major conclusions, areas of controversy (including issues raised by agencies and the public), and the issues to be resolved (including the choice among alternatives). The summary will normally not exceed 15 pages.

§ 1502.13 Purpose and need.

The statement shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.

§ 1502.14 Alternatives including the proposed action.

This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (§ 1502.15) and the Environmental Consequences (§ 1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:

(a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.

(b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.

(c) Include reasonable alternatives not within the jurisdiction of the lead agency.

(d) Include the alternative of no action.

(e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.

(f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

§ 1502.15 Affected environment.

The environmental impact statement shall succinctly describe the environment of the area(s) to be affected or created by the alternatives under consideration. The descriptions shall be no longer than is necessary to understand the effects of the alternatives. Data and analyses in a statement shall be commensurate with the importance of the impact, with less important material summarized, consolidated, or simply referenced. Agencies shall avoid useless bulk in statements and shall concentrate effort and attention on important issues. Verbose descriptions of the affected environment are themselves no measure of the adequacy of an environmental impact statement.

§ 1502.16 Environmental consequences.

This section forms the scientific and analytic basis for the comparisons under § 1502.14. It shall consolidate the discussions of those elements required by sections 102(2)(C)(i), (ii), (iv), and (v) of NEPA which are within the scope of the statement and as much of section 102(2)(C)(iii) as is necessary to support the comparisons. The discussion will include the environmental impacts of the alternatives including the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, the relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible or irretrievable commitments of resources which would be involved in the proposal should it be implemented. This section should not duplicate discussions in § 1502.14. It shall include discussions of:

(a) Direct effects and their significance (§ 1508.8).

(b) Indirect effects and their significance (§ 1508.8).

(c) Possible conflicts between the proposed action and the objectives of Federal, regional, State, and local (and in the case of a reservation, Indian tribe) land use plans, policies and controls for the area concerned. (See § 1506.2(d).)

(d) The environmental effects of alternatives including the proposed action. The comparisons under § 1502.14 will be based on this discussion.

(e) Energy requirements and conservation potential of various alternatives and mitigation measures.

(f) Natural or depletable resource requirements and conservation potential of various alternatives and mitigation measures.

(g) Urban quality, historic and cultural resources, and the design of the built environment, including the reuse and conservation potential of various alternatives and mitigation measures.

(h) Means to mitigate adverse environmental impacts (if not fully covered under § 1502.14(f)).

[43 FR 55994, Nov. 29, 1978; 44 FR 873, Jan. 3, 1979]

§ 1502.17 List of preparers.

The environmental impact statement shall list the names, together with their qualifications (expertise, experience, professional disciplines), of the persons who were primarily responsible for preparing the environmental impact statement or significant background papers, including basic components of the statement (§§ 1502.6 and 1502.8). Where possible the persons who are responsible for a particular analysis, including analyses in background papers, shall be identified. Normally the list will not exceed two pages.

§ 1502.18 Appendix.

If an agency prepares an appendix to an environmental impact statement the appendix shall:

(a) Consist of material prepared in connection with an environmental impact statement (as distinct from material which is not so prepared and which is incorporated by reference (§ 1502.21)).

(b) Normally consist of material which substantiates any analysis fundamental to the impact statement.

(c) Normally be analytic and relevant to the decision to be made.

(d) Be circulated with the environmental impact statement or be readily available on request.

§ 1502.19 Circulation of the environmental impact statement.

Agencies shall circulate the entire draft and final environmental impact statements except for certain appendices as provided in § 1502.18(d) and unchanged statements as provided in § 1503.4(c). However, if the statement is unusually long, the agency may circulate the summary instead, except that the entire statement shall be furnished to:

(a) Any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved and any appropriate Federal, State or local agency authorized to develop and enforce environmental standards.

(b) The applicant, if any.

(c) Any person, organization, or agency requesting the entire environmental impact statement.

(d) In the case of a final environmental impact statement any person, organization, or agency which submitted substantive comments on the draft.

If the agency circulates the summary and thereafter receives a timely request for the entire statement and for additional time to comment, the time for that requestor only shall be extended by at least 15 days beyond the minimum period.

§ 1502.20 Tiering.

Agencies are encouraged to tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review (§ 1508.28). Whenever a broad environmental impact statement has been prepared (such as a program or policy statement) and a subsequent statement or environmental assessment is then prepared on an action included within the entire program or policy (such as a site specific action) the subsequent statement or environmental assessment need only summarize the issues discussed in the broader statement and incorporate discussions from the broader statement by reference and shall concentrate on the issues specific to the subsequent action. The subsequent document shall state where the earlier document is available. Tiering may also be appropriate for different stages of actions. (Section 1508.28).

§ 1502.21 Incorporation by reference.

Agencies shall incorporate material into an environmental impact statement by reference when the effect will be to cut down on bulk without impeding agency and public review of the action. The incorporated material shall be cited in the statement and its content briefly described. No material may be incorporated by reference unless it is reasonably available for inspection by potentially interested persons within the time allowed for comment. Material based on proprietary data which is itself not available for review and comment shall not be incorporated by reference.

§ 1502.22 Incomplete or unavailable information.

When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking.

(a) If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.

(b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within the environmental impact statement:

(1) A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. For the purposes of this section, "reasonably foreseeable" includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.

(c) The amended regulation will be applicable to all environmental impact statements for which a Notice of Intent (40 CFR 1508.22) is published in the FEDERAL REGISTER on or after May 27, 1986. For environmental impact statements in progress, agencies may choose to comply with the requirements of either the original or amended regulation.

[51 FR 15625, Apr. 25, 1986]

§ 1502.23 Cost-benefit analysis.

If a cost-benefit analysis relevant to the choice among environmentally different alternatives is being considered for the proposed action, it shall be incorporated by reference or appended to the statement as an aid in evaluating the environmental consequences. To assess the adequacy of compliance with section 102(2)(B) of the Act the statement shall, when a cost-benefit analysis is prepared, discuss the relationship between that analysis and any analyses of unquantified environmental impacts, values, and amenities. For purposes of complying with the Act, the weighing of the merits and drawbacks of the various alternatives need not be displayed in a monetary cost-benefit analysis and should not be when there are important qualitative considerations. In any event, an environmental impact statement should at least indicate those considerations, including factors not related to environmental quality, which are likely to be relevant and important to a decision.

§ 1502.24 Methodology and scientific accuracy.

Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement. An agency may place discussion of methodology in an appendix.

§ 1502.25 Environmental review and consultation requirements.

(a) To the fullest extent possible, agencies shall prepare draft environmental impact statements concurrently with and integrated with environmental impact analyses and related surveys and studies required by the Fish and Wildlife Coordination Act (16 U.S.C. 661 *et seq.*), the National Historic Preservation Act of 1966 (16 U.S.C. 470 *et seq.*), the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.), and other environmental review laws and executive orders.

(b) The draft environmental impact statement shall list all Federal permits, licenses, and other entitlements which must be obtained in implementing the proposal. If it is uncertain whether a Federal permit, license, or other entitlement is necessary, the draft environmental impact statement shall so indicate.

PART 1503—COMMENTING

Sec.
1503.1 Inviting comments.
1503.2 Duty to comment.
1503.3 Specificity of comments.
1503.4 Response to comments.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 55997, Nov. 29, 1978, unless otherwise noted.

§ 1503.1 Inviting comments.

(a) After preparing a draft environmental impact statement and before preparing a final environmental impact statement the agency shall:

(1) Obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved or which is authorized to develop and enforce environmental standards.

(2) Request the comments of:

(i) Appropriate State and local agencies which are authorized to develop and enforce environmental standards;

(ii) Indian tribes, when the effects may be on a reservation; and

(iii) Any agency which has requested that it receive statements on actions of the kind proposed.

Office of Management and Budget Circular A-95 (Revised), through its system of clearinghouses, provides a means of securing the views of State and local environmental agencies. The clearinghouses may be used, by mutual agreement of the lead agency and the clearinghouse, for securing

State and local reviews of the draft environmental impact statements.

(3) Request comments from the applicant, if any.

(4) Request comments from the public, affirmatively soliciting comments from those persons or organizations who may be interested or affected.

(b) An agency may request comments on a final environmental impact statement before the decision is finally made. In any case other agencies or persons may make comments before the final decision unless a different time is provided under § 1506.10.

§ 1503.2 Duty to comment.

Federal agencies with jurisdiction by law or special expertise with respect to any environmental impact involved and agencies which are authorized to develop and enforce environmental standards shall comment on statements within their jurisdiction, expertise, or authority. Agencies shall comment within the time period specified for comment in § 1506.10. A Federal agency may reply that it has no comment. If a cooperating agency is satisfied that its views are adequately reflected in the environmental impact statement, it should reply that it has no comment.

§ 1503.3 Specificity of comments.

(a) Comments on an environmental impact statement or on a proposed action shall be as specific as possible and may address either the adequacy of the statement or the merits of the alternatives discussed or both.

(b) When a commenting agency criticizes a lead agency's predictive methodology, the commenting agency should describe the alternative methodology which it prefers and why.

(c) A cooperating agency shall specify in its comments whether it needs additional information to fulfill other applicable environmental reviews or consultation requirements and what information it needs. In particular, it shall specify any additional information it needs to comment adequately on the draft statement's analysis of significant site-specific effects associated with the granting or approving by that cooperating agency of necessary Federal permits, licenses, or entitlements.

(d) When a cooperating agency with jurisdiction by law objects to or expresses reservations about the proposal on grounds of environmental impacts, the agency expressing the objection or reservation shall specify the mitigation measures it considers necessary to allow the agency to grant or approve applicable permit, license, or related requirements or concurrences.

§ 1503.4 Response to comments.

(a) An agency preparing a final environmental impact statement shall assess and consider comments both individually and collectively, and shall respond by one or more of the means listed below, stating its response in the final statement. Possible responses are to:

(1) Modify alternatives including the proposed action.

(2) Develop and evaluate alternatives not previously given serious consideration by the agency.

(3) Supplement, improve, or modify its analyses.

(4) Make factual corrections.

(5) Explain why the comments do not warrant further agency response, citing the sources, authorities, or reasons which support the agency's position and, if appropriate, indicate those circumstances which would trigger agency reappraisal or further response.

(b) All substantive comments received on the draft statement (or summaries thereof where the response has been exceptionally voluminous), should be attached to the final statement whether or not the comment is thought to merit individual discussion by the agency in the text of the statement.

(c) If changes in response to comments are minor and are confined to the responses described in paragraphs (a)(4) and (5) of this section, agencies may write them on errata sheets and attach them to the statement instead of rewriting the draft statement. In such cases only the comments, the responses, and the changes and not the final statement need be circulated (§ 1502.19). The entire document with a new cover sheet shall be filed as the final statement (§ 1506.9).

PART 1504—PREDECISION REFERRALS TO THE COUNCIL OF PROPOSED FEDERAL ACTIONS DETERMINED TO BE ENVIRONMENTALLY UNSATISFACTORY

Sec.

1504.1 Purpose.
1504.2 Criteria for referral.
1504.3 Procedure for referrals and response.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

§ 1504.1 Purpose.

(a) This part establishes procedures for referring to the Council Federal interagency disagreements concerning proposed major Federal actions that might cause unsatisfactory environmental effects. It provides means for early resolution of such disagreements.

(b) Under section 309 of the Clean Air Act (42 U.S.C. 7609), the Administrator of the Environmental Protection Agency is directed to review and comment publicly on the environmental impacts of Federal activities, including actions for which environmental impact statements are prepared. If after this review the Administrator determines that the matter is "unsatisfactory from the standpoint of public health or welfare or environmental quality," section 309 directs that the matter be referred to the Council (hereafter "environmental referrals").

(c) Under section 102(2)(C) of the Act other Federal agencies may make similar reviews of environmental impact statements, including judgments on the acceptability of anticipated environmental impacts. These reviews must be made available to the President, the Council and the public.

[43 FR 55998, Nov. 29, 1978]

§ 1504.2 Criteria for referral.

Environmental referrals should be made to the Council only after concerted, timely (as early as possible in the process), but unsuccessful attempts to resolve differences with the lead agency. In determining what environmental objections to the matter are appropriate to refer to the Council, an agency should weigh potential adverse environmental impacts, considering:

(a) Possible violation of national environmental standards or policies.

(b) Severity.

(c) Geographical scope.

(d) Duration.

(e) Importance as precedents.

(f) Availability of environmentally preferable alternatives.

[43 FR 55998, Nov. 29, 1978]

§ 1504.3 Procedure for referrals and response.

(a) A Federal agency making the referral to the Council shall:

(1) Advise the lead agency at the earliest possible time that it intends to refer a matter to the Council unless a satisfactory agreement is reached.

(2) Include such advice in the referring agency's comments on the draft environmental impact statement, except when the statement does not contain adequate information to permit an assessment of the matter's environmental acceptability.

(3) Identify any essential information that is lacking and request that it be made available at the earliest possible time.

(4) Send copies of such advice to the Council.

(b) The referring agency shall deliver its referral to the Council not later than twenty-five (25) days after the final environmental impact statement has been made available to the Environmental Protection Agency, commenting agencies, and the public. Except when an extension of this period has been granted by the lead agency, the Council will not accept a referral after that date.

(c) The referral shall consist of:

(1) A copy of the letter signed by the head of the referring agency and delivered to the lead agency informing the lead agency of the referral and the reasons for it, and requesting that no action be taken to implement the matter until the Council acts upon the

referral. The letter shall include a copy of the statement referred to in (c)(2) of this section.

(2) A statement supported by factual evidence leading to the conclusion that the matter is unsatisfactory from the standpoint of public health or welfare or environmental quality. The statement shall:

(i) Identify any material facts in controversy and incorporate (by reference if appropriate) agreed upon facts,

(ii) Identify any existing environmental requirements or policies which would be violated by the matter,

(iii) Present the reasons why the referring agency believes the matter is environmentally unsatisfactory,

(iv) Contain a finding by the agency whether the issue raised is of national importance because of the threat to national environmental resources or policies or for some other reason,

(v) Review the steps taken by the referring agency to bring its concerns to the attention of the lead agency at the earliest possible time, and

(vi) Give the referring agency's recommendations as to what mitigation alternative, further study, or other course of action (including abandonment of the matter) are necessary to remedy the situation.

(d) Not later than twenty-five (25) days after the referral to the Council the lead agency may deliver a response to the Council, and the referring agency. If the lead agency requests more time and gives assurance that the matter will not go forward in the interim, the Council may grant an extension. The response shall:

(1) Address fully the issues raised in the referral.

(2) Be supported by evidence.

(3) Give the lead agency's response to the referring agency's recommendations.

(e) Interested persons (including the applicant) may deliver their views in writing to the Council. Views in support of the referral should be delivered not later than the referral. Views in support of the response shall be delivered not later than the response.

(f) Not later than twenty-five (25) days after receipt of both the referral and any response or upon being informed that there will be no response (unless the lead agency agrees to a longer time), the Council may take one or more of the following actions:

(1) Conclude that the process of referral and response has successfully resolved the problem.

(2) Initiate discussions with the agencies with the objective of mediation with referring and lead agencies.

(3) Hold public meetings or hearings to obtain additional views and information.

(4) Determine that the issue is not one of national importance and request the referring and lead agencies to pursue their decision process.

(5) Determine that the issue should be further negotiated by the referring and lead agencies and is not appropriate for Council consideration until one or more heads of agencies report to the Council that the agencies' disagreements are irreconcilable.

(6) Publish its findings and recommendations (including where appropriate a finding that the submitted evidence does not support the position of an agency).

(7) When appropriate, submit the referral and the response together with the Council's recommendation to the President for action.

(g) The Council shall take no longer than 60 days to complete the actions specified in paragraph (f)(2), (3), or (5) of this section.

(h) When the referral involves an action required by statute to be determined on the record after opportunity for agency hearing, the referral shall be conducted in a manner consistent with 5 U.S.C. 557(d) (Administrative Procedure Act).

[43 FR 55998, Nov. 29, 1978; 44 FR 873, Jan. 3, 1979]

PART 1505—NEPA AND AGENCY DECISIONMAKING

Sec.
1505.1 Agency decisionmaking procedures.
1505.2 Record of decision in cases requiring environmental impact statements.
1505.3 Implementing the decision.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C.

7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 55999, Nov. 29, 1978, unless otherwise noted.

§ 1505.1 Agency decisionmaking procedures.

Agencies shall adopt procedures (§ 1507.3) to ensure that decisions are made in accordance with the policies and purposes of the Act. Such procedures shall include but not be limited to:

(a) Implementing procedures under section 102(2) to achieve the requirements of sections 101 and 102(1).

(b) Designating the major decision points for the agency's principal programs likely to have a significant effect on the human environment and assuring that the NEPA process corresponds with them.

(c) Requiring that relevant environmental documents, comments, and responses be part of the record in formal rulemaking or adjudicatory proceedings.

(d) Requiring that relevant environmental documents, comments, and responses accompany the proposal through existing agency review processes so that agency officials use the statement in making decisions.

(e) Requiring that the alternatives considered by the decisionmaker are encompassed by the range of alternatives discussed in the relevant environmental documents and that the decisionmaker consider the alternatives described in the environmental impact statement. If another decision document accompanies the relevant environmental documents to the decisionmaker, agencies are encouraged to make available to the public before the decision is made any part of that document that relates to the comparison of alternatives.

§ 1505.2 Record of decision in cases requiring environmental impact statements.

At the time of its decision (§ 1506.10) or, if appropriate, its recommendation to Congress, each agency shall prepare a concise public record of decision. The record, which may be integrated into any other record prepared by the agency, including that required by OMB Circular A-95 (Revised), part I, sections 6(c) and (d), and part II, section 5(b)(4), shall:

(a) State what the decision was.

(b) Identify all alternatives considered by the agency in reaching its decision, specifying the alternative or alternatives which were considered to be environmentally preferable. An agency may discuss preferences among alternatives based on relevant factors including economic and technical considerations and agency statutory missions. An agency shall identify and discuss all such factors including any essential considerations of national policy which were balanced by the agency in making its decision and state how those considerations entered into its decision.

(c) State whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not. A monitoring and enforcement program shall be adopted and summarized where applicable for any mitigation.

§ 1505.3 Implementing the decision.

Agencies may provide for monitoring to assure that their decisions are carried out and should do so in important cases. Mitigation (§ 1505.2(c)) and other conditions established in the environmental impact statement or during its review and committed as part of the decision shall be implemented by the lead agency or other appropriate consenting agency. The lead agency shall:

(a) Include appropriate conditions in grants, permits or other approvals.

(b) Condition funding of actions on mitigation.

(c) Upon request, inform cooperating or commenting agencies on progress in carrying out mitigation measures which they have proposed and which were adopted by the agency making the decision.

(d) Upon request, make available to the public the results of relevant monitoring.

PART 1506—OTHER REQUIREMENTS OF NEPA

Sec.
1506.1 Limitations on actions during NEPA process.
1506.2 Elimination of duplication with State and local procedures.
1506.3 Adoption.
1506.4 Combining documents.
1506.5 Agency responsibility.
1506.6 Public involvement.
1506.7 Further guidance.
1506.8 Proposals for legislation.
1506.9 Filing requirements.
1506.10 Timing of agency action.
1506.11 Emergencies.
1506.12 Effective date.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 56000, Nov. 29, 1978, unless otherwise noted.

§ 1506.1 Limitations on actions during NEPA process.

(a) Until an agency issues a record of decision as provided in § 1505.2 (except as provided in paragraph (c) of this section), no action concerning the proposal shall be taken which would:

(1) Have an adverse environmental impact; or

(2) Limit the choice of reasonable alternatives.

(b) If any agency is considering an application from a non-Federal entity, and is aware that the applicant is about to take an action within the agency's jurisdiction that would meet either of the criteria in paragraph (a) of this section, then the agency shall promptly notify the applicant that the agency will take appropriate action to insure that the objectives and procedures of NEPA are achieved.

(c) While work on a required program environmental impact statement is in progress and the action is not covered by an existing program statement, agencies shall not undertake in the interim any major Federal action covered by the program which may significantly affect the quality of the human environment unless such action:

(1) Is justified independently of the program;

(2) Is itself accompanied by an adequate environmental impact statement; and

(3) Will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives.

(d) This section does not preclude development by applicants of plans or designs or performance of other work necessary to support an application for Federal, State or local permits or assistance. Nothing in this section shall preclude Rural Electrification Administration approval of minimal expenditures not affecting the environment (*e.g.* long leadtime equipment and purchase options) made by nongovernmental entities seeking loan guarantees from the Administration.

§ 1506.2 Elimination of duplication with State and local procedures.

(a) Agencies authorized by law to cooperate with State agencies of statewide jurisdiction pursuant to section 102(2)(D) of the Act may do so.

(b) Agencies shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and State and local requirements, unless the agencies are specifically barred from doing so by some other law. Except for cases covered by paragraph (a) of this section, such cooperation shall to the fullest extent possible include:

(1) Joint planning processes.

(2) Joint environmental research and studies.

(3) Joint public hearings (except where otherwise provided by statute).

(4) Joint environmental assessments.

(c) Agencies shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and comparable State and local requirements, unless the agencies are specifically barred from doing so by some other law. Except for cases covered by paragraph (a) of this section, such cooperation shall to the fullest extent possible include joint environmental impact statements. In such cases one or more Federal agencies and one or more State or local agencies shall be joint lead agencies. Where State laws or local ordinances have environmental impact statement requirements in addition to but not in conflict with those in NEPA, Federal agencies shall cooperate in fulfilling these requirements as well as those of Federal laws so that one document will comply with all applicable laws.

(d) To better integrate environmental impact statements into State or local planning processes, statements shall discuss any inconsistency of a proposed action with any approved State or local plan and laws (whether or not federally sanctioned). Where an inconsistency exists, the statement should describe the extent to which the agency would reconcile its proposed action with the plan or law.

§ 1506.3 Adoption.

(a) An agency may adopt a Federal draft or final environmental impact statement or portion thereof provided that the statement or portion thereof meets the standards for an adequate statement under these regulations.

(b) If the actions covered by the original environmental impact statement and the proposed action are substantially the same, the agency adopting another agency's statement is not required to recirculate it except as a final statement. Otherwise the adopting agency shall treat the statement as a draft and recirculate it (except as provided in paragraph (c) of this section).

(c) A cooperating agency may adopt without recirculating the environmental impact statement of a lead agency when, after an independent review of the statement, the cooperating agency concludes that its comments and suggestions have been satisfied.

(d) When an agency adopts a statement which is not final within the agency that prepared it, or when the action it assesses is the subject of a referral under part 1504, or when the statement's adequacy is the subject of a judicial action which is not final, the agency shall so specify.

§ 1506.4 Combining documents.

Any environmental document in compliance with NEPA may be combined with any other agency document to reduce duplication and paperwork.

§ 1506.5 Agency responsibility.

(a) *Information.* If an agency requires an applicant to submit environmental information for possible use by the agency in preparing an environmental impact statement, then the agency should assist the applicant by outlining the types of information required. The agency shall independently evaluate the information submitted and shall be responsible for its accuracy. If the agency chooses to use the information submitted by the applicant in the environmental impact statement, either directly or by reference, then the names of the persons responsible for the independent evaluation shall be included in the list of preparers (§ 1502.17). It is the intent of this paragraph that acceptable work not be redone, but that it be verified by the agency.

(b) *Environmental assessments.* If an agency permits an applicant to prepare an environmental assessment, the agency, besides fulfilling the requirements of paragraph (a) of this section, shall make its own evaluation of the environmental issues and take responsibility for the scope and content of the environmental assessment.

(c) *Environmental impact statements.* Except as provided in §§ 1506.2 and 1506.3 any environmental impact statement prepared pursuant to the requirements of NEPA shall be prepared directly by or by a contractor selected by the lead agency or where appropriate under § 1501.6(b), a cooperating agency. It is the intent of these regulations that the contractor be chosen solely by the lead agency, or by the lead agency in cooperation with cooperating agencies, or where appropriate by a cooperating agency to avoid any conflict of interest. Contractors shall execute a disclosure statement prepared by the lead agency, or where appropriate the cooperating agency, specifying that they have no financial or other interest in the outcome of the project. If the document is prepared by contract, the responsible Federal official shall furnish guidance and participate in the preparation and shall independently evaluate the statement prior to its approval and take responsibility for its scope and contents. Nothing in this section is intended to prohibit any agency from requesting any person to submit information to it or to prohibit any person from submitting information to any agency.

§ 1506.6 Public involvement.

Agencies shall:

(a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures.

(b) Provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected.

(1) In all cases the agency shall mail notice to those who have requested it on an individual action.

(2) In the case of an action with effects of national concern notice shall include publication in the FEDERAL REGISTER and notice by mail to national organizations reasonably expected to be interested in the matter and may include listing in the *102 Monitor.* An agency engaged in rulemaking may provide notice by mail to national organizations who have requested that notice regularly be provided. Agencies shall maintain a list of such organizations.

(3) In the case of an action with effects primarily of local concern the notice may include:

(i) Notice to State and areawide clearinghouses pursuant to OMB Circular A-95 (Revised).

(ii) Notice to Indian tribes when effects may occur on reservations.

(iii) Following the affected State's public notice procedures for comparable actions.

(iv) Publication in local newspapers (in papers of general circulation rather than legal papers).

(v) Notice through other local media.

(vi) Notice to potentially interested community organizations including small business associations.

(vii) Publication in newsletters that may be expected to reach potentially interested persons.

(viii) Direct mailing to owners and occupants of nearby or affected property.

(ix) Posting of notice on and off site in the area where the action is to be located.

(c) Hold or sponsor public hearings or public meetings whenever appropriate or in accordance with statutory requirements applicable to the agency. Criteria shall include whether there is:

(1) Substantial environmental controversy concerning the proposed action or substantial interest in holding the hearing.

(2) A request for a hearing by another agency with jurisdiction over the action supported by reasons why a hearing will be helpful. If a draft environmental impact statement is to be considered at a public hearing, the agency should make the statement available to the public at least 15 days in advance (unless the purpose of the hearing is to provide information for the draft environmental impact statement).

(d) Solicit appropriate information from the public.

(e) Explain in its procedures where interested persons can get information or status reports on environmental impact statements and other elements of the NEPA process.

(f) Make environmental impact statements, the comments received, and any underlying documents available to the public pursuant to the provisions of the Freedom of Information Act (5 U.S.C. 552), without regard to the exclusion for interagency memoranda where such memoranda transmit comments of Federal agencies on the environmental impact of the proposed action. Materials to be made available to the public shall be provided to the public without charge to the extent practicable, or at a fee which is not more than the actual costs of reproducing copies required to be sent to other Federal agencies, including the Council.

§ 1506.7 Further guidance.

The Council may provide further guidance concerning NEPA and its procedures including:

(a) A handbook which the Council may supplement from time to time, which shall in plain language provide guidance and instructions concerning the application of NEPA and these regulations.

(b) Publication of the Council's Memoranda to Heads of Agencies.

(c) In conjunction with the Environmental Protection Agency and the publication of the 102 Monitor, notice of:

(1) Research activities;

(2) Meetings and conferences related to NEPA; and

(3) Successful and innovative procedures used by agencies to implement NEPA.

§ 1506.8 Proposals for legislation.

(a) The NEPA process for proposals for legislation (§ 1508.17) significantly affecting the quality of the human environment shall be integrated with the legislative process of the Congress. A legislative environmental impact statement is the detailed statement required by law to be included in a recommendation or report on a legislative proposal to Congress. A legislative environmental impact statement shall be considered part of the formal transmittal of a legislative proposal to Congress; however, it may be transmitted to Congress up to 30 days later in order to allow time for completion of an accurate statement which can serve as the basis for public and Congressional debate. The statement must be available in time for Congressional hearings and deliberations.

(b) Preparation of a legislative environmental impact statement shall conform to the requirements of these regulations except as follows:

(1) There need not be a scoping process.

(2) The legislative statement shall be prepared in the same manner as a draft statement, but shall be considered the "detailed statement" required by statute; *Provided*, That when any of the following conditions exist both the draft and final environmental impact statement on the legislative proposal shall be prepared and circulated as provided by §§ 1503.1 and 1506.10.

(i) A Congressional Committee with jurisdiction over the proposal has a rule requiring both draft and final environmental impact statements.

(ii) The proposal results from a study process required by statute (such as those required by the Wild and Scenic Rivers Act (16 U.S.C. 1271 *et seq.*) and the Wilderness Act (16 U.S.C. 1131 *et seq.*)).

(iii) Legislative approval is sought for Federal or federally assisted construction or other projects which the agency recommends be located at specific geographic locations. For proposals requiring an environmental impact statement for the acquisition of space by the General Services Administration, a draft statement shall accompany the Prospectus or the 11(b) Report of Building Project Surveys to the Congress, and a final statement shall be completed before site acquisition.

(iv) The agency decides to prepare draft and final statements.

(c) Comments on the legislative statement shall be given to the lead agency which shall forward them along with its own responses to the Congressional committees with jurisdiction.

§ 1506.9 Filing requirements.

Environmental impact statements together with comments and responses shall be filed with the Environmental Protection Agency, attention Office of Federal Activities (A-104), 401 M Street SW., Washington, DC 20460. Statements shall be filed with EPA no earlier than they are also transmitted to commenting agencies and made available to the public. EPA shall deliver one copy of each statement to the Council, which shall satisfy the requirement of availability to the President. EPA may issue guidelines to agencies to implement its responsibilities under this section and § 1506.10.

§ 1506.10 Timing of agency action.

(a) The Environmental Protection Agency shall publish a notice in the FEDERAL REGISTER each week of the environmental impact statements filed during the preceding week. The minimum time periods set forth in this section shall be calculated from the date of publication of this notice.

(b) No decision on the proposed action shall be made or recorded under § 1505.2 by a Federal agency until the later of the following dates:

(1) Ninety (90) days after publication of the notice described above in paragraph (a) of this section for a draft environmental impact statement.

(2) Thirty (30) days after publication of the notice described above in paragraph (a) of this section for a final environmental impact statement.

An exception to the rules on timing may be made in the case of an agency decision which is subject to a formal internal appeal. Some agencies have a formally established appeal process which allows other agencies or the public to take appeals on a decision and make their views known, after publication of the final environmental impact statement. In such cases, where a real opportunity exists to alter the decision, the decision may be made and recorded at the same time the environmental impact statement is published. This means that the period for appeal of the decision and the 30-day period prescribed in paragraph (b)(2) of this section may run concurrently. In such cases the environmental impact statement shall explain the timing and the public's right of appeal. An agency engaged in rulemaking under the Administrative Procedure Act or other statute for the purpose of protecting the public health or safety, may waive the time period in paragraph (b)(2) of this section and publish a decision on the final rule simultaneously with publication of the notice of the availability of the final environmental impact statement as described in paragraph (a) of this section.

(c) If the final environmental impact statement is filed within ninety (90) days after a draft environmental impact statement is filed with the Environmental Protection Agency, the minimum thirty (30) day period and the minimum ninety (90) day period may run concurrently. However, subject to paragraph (d) of this section agencies shall allow not less than 45 days for comments on draft statements.

(d) The lead agency may extend prescribed periods. The Environmental Protection Agency may upon a showing by the lead agency of compelling reasons of national policy reduce the prescribed periods and may upon a showing by any other Federal agency of compelling reasons of national policy also extend prescribed periods, but only after consultation with the lead agency. (Also see § 1507.3(d).) Failure to file timely comments shall not be a sufficient reason for extending a period. If the lead agency does not concur with the extension of time, EPA may not extend it for more than 30 days. When the Environmental Protection Agency reduces or extends any period of time it shall notify the Council.

[43 FR 56000, Nov. 29, 1978; 44 FR 874, Jan. 3, 1979]

§ 1506.11 Emergencies.

Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these regulations, the Federal agency taking the action should consult with the Council about alternative arrangements. Agencies and the Council will limit such arrangements to actions necessary to control the immediate impacts of the emergency. Other actions remain subject to NEPA review.

§ 1506.12 Effective date.

The effective date of these regulations is July 30, 1979, except that for agencies that administer programs that qualify under section 102(2)(D) of the Act or under section 104(h) of the Housing and Community Development Act of 1974 an additional four months shall be allowed for the State or local agencies to adopt their implementing procedures.

(a) These regulations shall apply to the fullest extent practicable to ongoing activities and environmental documents begun before the effective date. These regulations do not apply to an environmental impact statement or supplement if the draft statement was filed before the effective date of these regulations. No completed environmental documents need be redone by reasons of these regulations. Until these regulations are applicable, the Council's guidelines published in the FEDERAL REGISTER of August 1, 1973, shall continue to be applicable. In cases where these regulations are applicable the guidelines are superseded. However, nothing shall prevent an agency from proceeding under these regulations at an earlier time.

(b) NEPA shall continue to be applicable to actions begun before January 1, 1970, to the fullest extent possible.

PART 1507—AGENCY COMPLIANCE

Sec.
1507.1 Compliance.
1507.2 Agency capability to comply.
1507.3 Agency procedures.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 56002, Nov. 29, 1978, unless otherwise noted.

§ 1507.1 Compliance.

All agencies of the Federal Government shall comply with these regulations. It is the intent of these regulations to allow each agency flexibility in adapting its implementing procedures authorized by § 1507.3 to the requirements of other applicable laws.

§ 1507.2 Agency capability to comply.

Each agency shall be capable (in terms of personnel and other resources) of complying with the requirements enumerated below. Such compliance may include use of other's resources, but the using agency shall itself have sufficient capability to evaluate what others do for it. Agencies shall:

(a) Fulfill the requirements of section 102(2)(A) of the Act to utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on the human environment. Agencies shall designate a person to be responsible for overall review of agency NEPA compliance.

(b) Identify methods and procedures required by section 102(2)(B) to insure that presently unquantified environmental amenities and values may be given appropriate consideration.

(c) Prepare adequate environmental impact statements pursuant to section 102(2)(C) and comment on statements in the areas where the agency has jurisdiction by law or special expertise or is authorized to develop and enforce environmental standards.

(d) Study, develop, and describe alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources. This requirement of section 102(2)(E) extends to all such proposals, not just the more limited scope of section 102(2)(C)(iii) where the discussion of alternatives is confined to impact statements.

(e) Comply with the requirements of section 102(2)(H) that the agency initiate and utilize ecological information in the planning and development of resource-oriented projects.

(f) Fulfill the requirements of sections 102(2)(F), 102(2)(G), and 102(2)(I), of the Act and of Executive Order 11514, Protection and Enhancement of Environmental Quality, Sec. 2.

§ 1507.3 Agency procedures.

(a) Not later than eight months after publication of these regulations as finally adopted in the FEDERAL REGISTER, or five months after the establishment of an agency, whichever shall come later, each agency shall as necessary adopt procedures to supplement these regulations. When the agency is a department, major subunits are encouraged (with the consent of the department) to adopt their own procedures. Such procedures shall not paraphrase these regulations. They shall confine themselves to implementing procedures. Each agency shall consult with the Council while developing its procedures and before publishing them in the FEDERAL REGISTER for comment. Agencies with similar programs should consult with each other and the Council to coordinate their procedures, especially for programs requesting similar information from applicants. The procedures shall be adopted only after an opportunity for public review and after review by the Council for conformity with the Act and these regulations. The Council shall complete its review within 30 days. Once in effect they shall be filed with the Council and made readily available to the public. Agencies are encouraged to publish explanatory guidance for these regulations and their own procedures. Agencies shall continue to review their policies and procedures and in consultation with the Council to revise them as necessary to ensure full compliance with the purposes and provisions of the Act.

(b) Agency procedures shall comply with these regulations except where compliance would be inconsistent with statutory requirements and shall include:

(1) Those procedures required by §§ 1501.2(d), 1502.9(c)(3), 1505.1, 1506.6(e), and 1508.4.

(2) Specific criteria for and identification of those typical classes of action:

(i) Which normally do require environmental impact statements.

(ii) Which normally do not require either an environmental impact statement or an environmental assessment (categorical exclusions (§ 1508.4)).

(iii) Which normally require environmental assessments but not necessarily environmental impact statements.

(c) Agency procedures may include specific criteria for providing limited exceptions to the provisions of these regulations for classified proposals. They are proposed actions which are specifically authorized under criteria established by an Executive Order or statute to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive Order or statute. Environmental assessments and environmental impact statements which address classified proposals may be safeguarded and restricted from public dissemination in accordance with agencies' own regulations applicable to classified information. These documents may be organized so that classified portions can be included as annexes, in order that the unclassified portions can be made available to the public.

(d) Agency procedures may provide for periods of time other than those presented in § 1506.10 when necessary to comply with other specific statutory requirements.

(e) Agency procedures may provide that where there is a lengthy period between the agency's decision to prepare an environmental impact statement and the time of actual preparation, the notice of intent required by § 1501.7 may be published at a reasonable time in advance of preparation of the draft statement.

PART 1508—TERMINOLOGY AND INDEX

Sec.

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AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 56003, Nov. 29, 1978, unless otherwise noted.

§ 1508.1 Terminology.

The terminology of this part shall be uniform throughout the Federal Government.

§ 1508.2 Act.

"Act" means the National Environmental Policy Act, as amended (42 U.S.C. 4321, *et seq.*) which is also referred to as "NEPA."

§ 1508.3 Affecting.

"Affecting" means will or may have an effect on.

§ 1508.4 Categorical exclusion.

"Categorical exclusion" means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (§ 1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. An agency may decide in its procedures or otherwise, to prepare environmental assessments for the reasons stated in § 1508.9 even though it is not required to do so. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

§ 1508.5 Cooperating agency.

"Cooperating agency" means any Federal agency other than a lead agency which has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal (or a reasonable alternative) for legislation or other major Federal action significantly affecting the quality of the human environment. The selection and responsibilities of a cooperating agency are described in § 1501.6. A State or local agency of similar qualifications or, when the effects are on a reservation, an Indian Tribe, may by agreement with the lead agency become a cooperating agency.

§ 1508.6 Council.

"Council" means the Council on Environmental Quality established by title II of the Act.

§ 1508.7 Cumulative impact.

"Cumulative impact" is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

§ 1508.8 Effects.

"Effects" include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

§ 1508.9 Environmental assessment.

"Environmental assessment":

(a) Means a concise public document for which a Federal agency is responsible that serves to:

(1) Briefly provide sufficient evidence and analysis for determining

whether to prepare an environmental impact statement or a finding of no significant impact.

(2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.

(3) Facilitate preparation of a statement when one is necessary.

(b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

§ 1508.10 Environmental document.

"Environmental document" includes the documents specified in § 1508.9 (environmental assessment), § 1508.11 (environmental impact statement), § 1508.13 (finding of no significant impact), and § 1508.22 (notice of intent).

§ 1508.11 Environmental impact statement.

"Environmental impact statement" means a detailed written statement as required by section 102(2)(C) of the Act.

§ 1508.12 Federal agency.

"Federal agency" means all agencies of the Federal Government. It does not mean the Congress, the Judiciary, or the President, including the performance of staff functions for the President in his Executive Office. It also includes for purposes of these regulations States and units of general local government and Indian tribes assuming NEPA responsibilities under section 104(h) of the Housing and Community Development Act of 1974.

§ 1508.13 Finding of no significant impact.

"Finding of no significant impact" means a document by a Federal agency briefly presenting the reasons why an action, not otherwise excluded (§ 1508.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it (§ 1501.7(a)(5)). If the assessment is included, the finding need not repeat any of the discussion in the assessment but may incorporate it by reference.

§ 1508.14 Human environment.

"Human environment" shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. (See the definition of "effects" (§ 1508.8).) This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.

§ 1508.15 Jurisdiction by law.

"Jurisdiction by law" means agency authority to approve, veto, or finance all or part of the proposal.

§ 1508.16 Lead agency.

"Lead agency" means the agency or agencies preparing or having taken primary responsibility for preparing the environmental impact statement.

§ 1508.17 Legislation.

"Legislation" includes a bill or legislative proposal to Congress developed by or with the significant cooperation and support of a Federal agency, but does not include requests for appropriations. The test for significant cooperation is whether the proposal is in fact predominantly that of the agency rather than another source. Drafting does not by itself constitute significant cooperation. Proposals for legislation include requests for ratification of treaties. Only the agency which has primary responsibility for the subject matter involved will prepare a legislative environmental impact statement.

§ 1508.18 Major Federal action.

"Major Federal action" includes actions with effects that may be major and which are potentially subject to

Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§ 1508.27). Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.

(a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (§§ 1506.8, 1508.17). Actions do not include funding assistance solely in the form of general revenue sharing funds, distributed under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1221 *et seq.*, with no Federal agency control over the subsequent use of such funds. Actions do not include bringing judicial or administrative civil or criminal enforcement actions.

(b) Federal actions tend to fall within one of the following categories:

(1) Adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act, 5 U.S.C. 551 *et seq.;* treaties and international conventions or agreements; formal documents establishing an agency's policies which will result in or substantially alter agency programs.

(2) Adoption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based.

(3) Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.

(4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.

§ 1508.19 Matter.

"Matter" includes for purposes of part 1504:

(a) With respect to the Environmental Protection Agency, any proposed legislation, project, action or regulation as those terms are used in section 309(a) of the Clean Air Act (42 U.S.C. 7609).

(b) With respect to all other agencies, any proposed major federal action to which section 102(2)(C) of NEPA applies.

§ 1508.20 Mitigation.

"Mitigation" includes:

(a) Avoiding the impact altogether by not taking a certain action or parts of an action.

(b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.

(c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.

(d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.

(e) Compensating for the impact by replacing or providing substitute resources or environments.

§ 1508.21 NEPA process.

"NEPA process" means all measures necessary for compliance with the requirements of section 2 and title I of NEPA.

§ 1508.22 Notice of intent.

"Notice of intent" means a notice that an environmental impact statement will be prepared and considered. The notice shall briefly:

(a) Describe the proposed action and possible alternatives.

(b) Describe the agency's proposed scoping process including whether, when, and where any scoping meeting will be held.

(c) State the name and address of a person within the agency who can answer questions about the proposed action and the environmental impact statement.

§ 1508.23 Proposal.

"Proposal" exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated. Preparation of an environmental impact statement on a proposal should be timed (§ 1502.5) so that the final statement may be completed in time for the statement to be included in any recommendation or report on the proposal. A proposal may exist in fact as well as by agency declaration that one exists.

§ 1508.24 Referring agency.

"Referring agency" means the federal agency which has referred any matter to the Council after a determination that the matter is unsatisfactory from the standpoint of public health or welfare or environmental quality.

§ 1508.25 Scope.

Scope consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend on its relationships to other statements (§§1502.20 and 1508.28). To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:

(a) Actions (other than unconnected single actions) which may be:

(1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:

(i) Automatically trigger other actions which may require environmental impact statements.

(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.

(iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

(2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.

(3) Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequencies together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.

(b) Alternatives, which include: (1) No action alternative.

(2) Other reasonable courses of actions.

(3) Mitigation measures (not in the proposed action).

(c) Impacts, which may be: (1) Direct; (2) indirect; (3) cumulative.

§ 1508.26 Special expertise.

"Special expertise" means statutory responsibility, agency mission, or related program experience.

§ 1508.27 Significantly.

"Significantly" as used in NEPA requires considerations of both context and intensity:

(a) *Context.* This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) *Intensity.* This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency

believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

[43 FR 56003, Nov. 29, 1978; 44 FR 874, Jan. 3, 1979]

§ 1508.28 Tiering.

"Tiering" refers to the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basinwide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared. Tiering is appropriate when the sequence of statements or analyses is:

(a) From a program, plan, or policy environmental impact statement to a program, plan, or policy statement or analysis of lesser scope or to a site-specific statement or analysis.

(b) From an environmental impact statement on a specific action at an early stage (such as need and site selection) to a supplement (which is preferred) or a subsequent statement or analysis at a later stage (such as environmental mitigation). Tiering in such cases is appropriate when it helps the lead agency to focus on the issues which are ripe for decision and exclude from consideration issues already decided or not yet ripe.

MEMORANDUM TO AGENCIES: ANSWERS TO 40 MOST ASKED QUESTIONS ON NEPA REGULATIONS

Council on Environmental Quality

46 Fed. Reg. 18026-18038 (March 1, 1981)

18026

COUNCIL ON ENVIRONMENTAL QUALITY

40 CFR Parts 1500, 1501, 1502, 1503, 1504, 1505, 1506, 1507, and 1508

Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations

March 17, 1981.

AGENCY: Council on Environmental Quality, Executive Office of the President.

ACTION: Information Only: Publication of Memorandum to Agencies Containing Answers to 40 Most Asked Questions on NEPA Regulations.

SUMMARY: The Council on Environmental Quality, as part of its oversight of implementation of the National Environmental Policy Act, held meetings in the ten Federal regions with Federal, State, and local officials to discuss administration of the implementing regulations. The forty most asked questions were compiled in a memorandum to agencies for the information of relevant officials. In order efficiently to respond to public inquiries this memorandum is reprinted in this issue of the Federal Register.

FOR FURTHER INFORMATION CONTACT: Nicholas C. Yost, General Counsel, Council on Environmental Quality, 722 Jackson Place NW., Washington, D.C. 20006; 202-395-5750.

March 16, 1981.

Memorandum for Federal NEPA Liaisons, Federal, State, and Local Officials and Other Persons Involved in the NEPA Process

Subject: Questions and Answers About the NEPA Regulations

During June and July of 1980 the Council on Environmental Quality, with the assistance and cooperation of EPA's EIS Coordinators from the ten EPA regions, held one-day meetings with federal, state and local officials in the ten EPA regional offices around the country. In addition, on July 10, 1980, CEQ conducted a similar meeting for the Washington, D.C. NEPA liaisons and persons involved in the NEPA process. At these meetings CEQ discussed (a) the results of its 1980 review of Draft EISs issued since the July 30, 1979 effective date of the NEPA regulations, (b) agency compliance with the Record of Decision requirements in Section 1505 of the NEPA regulations, and (c) CEQ's preliminary findings on how the scoping process is working. Participants at these meetings received copies of materials prepared by CEQ summarizing its oversight and findings.

These meetings also provided NEPA liaisons and other participants with an opportunity to ask questions about NEPA and the practical application of the NEPA regulations. A number of these questions were answered by CEQ representatives at the regional meetings. In response to the many requests from the agencies and other participants, CEQ has compiled forty of the most important or most frequently asked questions and their answers and reduced them to writing. The answers were prepared by the General Counsel of CEQ in consultation with the Office of Federal Activities of EPA. These answers, of course, do not impose any additional requirements beyond those of the NEPA regulations. This document does not represent new guidance under the NEPA regulations, but rather makes generally available to concerned agencies and private individuals the answers which CEQ has already given at the 1980 regional meetings. The answers also reflect the advice which the Council has given over the past two years to aid agency staff and consultants in their day-to-day application of NEPA and the regulations.

CEQ has also received numerous inquiries regarding the scoping process. CEQ hopes to issue written guidance on scoping later this year on the basis of its special study of scoping, which is nearing completion.

Nicholas C. Yost,
General Counsel.

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Questions and Answers About the NEPA Regulations (1981)

1a. Q. What is meant by "range of alternatives" as referred to in Sec. 1505.1(e)? [1]

A. The phrase "range of alternatives" refers to the alternatives discussed in environmental documents. It includes all reasonable alternatives, which must be rigorously explored and objectively evaluated, as well as those other alternatives, which are eliminated from detailed study with a brief discussion of the reasons for eliminating them. Section 1502.14. A decisionmaker must not consider alternatives beyond the range of alternatives discussed in the relevant environmental documents. Moreover, a decisionmaker must, in fact, consider all the alternatives discussed in an EIS. Section 1505.1(e).

1b. Q. How many alternatives have to be discussed when there is an infinite number of possible alternatives?

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[1] References throughout the document are to the Council on Environmental Quality's Regulations For Implementing The Procedural Provisions of the National Environmental Policy Act. 40 CFR Parts 1500–1508.

A. For some proposals there may exist a very large or even an infinite number of possible reasonable alternatives. For example, a proposal to designate wilderness areas within a National Forest could be said to involve an infinite number of alternatives from 0 to 100 percent of the forest. When there are potentially a very large number of alternatives, only a reasonable number of examples, covering the *full spectrum* of alternatives, must be analyzed and compared in the EIS. An appropriate series of alternatives might include dedicating 0, 10, 30, 50, 70, 90, or 100 percent of the Forest to wilderness. What constitutes a reasonable range of alternatives depends on the nature of the proposal and the facts in each case.

2a. Q. If an EIS is prepared in connection with an application for a permit or other federal approval, must the EIS rigorously analyze and discuss alternatives that are outside the capability of the applicant or can it be limited to reasonable alternatives that can be carried out by the applicant?

A. Section 1502.14 requires the EIS to examine all reasonable alternatives to the proposal. In determining the scope of alternatives to be considered, the emphasis is on what is "reasonable" rather than on whether the proponent or applicant likes or is itself capable of carrying out a particular alternative. Reasonable alternatives include those that are *practical or feasible* from the technical and economic standpoint and using common sense, rather than simply *desirable* from the standpoint of the applicant.

2b. Q. Must the EIS analyze alternatives outside the jurisdiction or capability of the agency or beyond what Congress has authorized?

A. An alternative that is outside the legal jurisdiction of the lead agency must still be analyzed in the EIS if it is reasonable. A potential conflict with local or federal law does not necessarily render an alternative unreasonable, although such conflicts must be considered. Section 1506.2(d). Alternatives that are outside the scope of what Congress has approved or funded must still be evaluated in the EIS if they are reasonable, because the EIS may serve as the basis for modifying the Congressional approval or funding in light of NEPA's goals and policies. Section 1500.1(a).

3. Q. What does the "no action" alternative include? If an agency is under a court order or legislative command to act, must the EIS address the "no action" alternative?

A. Section 1502.14(d) requires the alternatives analysis in the EIS to "include the alternative of no action." There are two distinct interpretations of "no action" that must be considered, depending on the nature of the proposal being evaluated. The first situation might involve an action such as updating a land management plan where ongoing programs initiated under existing legislation and regulations will continue, even as new plans are developed. In these cases "no action" is "no change" from current management direction or level of management intensity. To construct an alternative that is based on no management at all would be a useless academic exercise. Therefore, the "no action" alternative may be thought of in terms of continuing with the present course of action until that action is changed. Consequently, projected impacts of alternative management schemes would be compared in the EIS to those impacts projected for the existing plan. In this case, alternatives would include management plans of both greater and lesser intensity, especially greater and lesser levels of resource development.

The second interpretation of "no action" is illustrated in instances involving federal decisions on proposals for projects. "No action" in such cases would mean the proposed activity would not take place, and the resulting environmental effects from taking no action would be compared with the effects of permitting the proposed activity or an alternative activity to go forward.

Where a choice of "no action" by the agency would result in predictable actions by others, this consequence of the "no action" alternative should be included in the analysis. For example, if denial of permission to build a railroad to a facility would lead to construction of a road and increased truck traffic, the EIS should analyze this consequence of the "no action" alternative.

In light of the above, it is difficult to think of a situation where it would *not* be appropriate to address a "no action" alternative. Accordingly, the regulations require the analysis of the no action alternative even if the agency is under a court order or legislative command to act. This analysis provides a benchmark, enabling decisionmakers to compare the magnitude of environmental effects of the action alternatives. It is also an example of a reasonable alternative outside the jurisdiction of the agency which must be analyzed. Section 1502.14(c). See Question 2 above. Inclusion of such an analysis in the EIS is necessary to inform the Congress, the public, and the President as intended by NEPA. Section 1500.1(a).

4a. Q. What is the "agency's preferred alternative"?

A. The "agency's preferred alternative" is the alternative which the agency believes would fulfill its statutory mission and responsibilities, giving consideration to economic, environmental, technical and other factors. The concept of the "agency's preferred alternative" is different from the "environmentally preferable alternative," although in some cases one alternative may be both. See Question 6 below. It is identified so that agencies and the public can understand the lead agency's orientation.

4b. Q. Does the "preferred alternative" have to be identified in the Draft EIS and the Final EIS or just in the Final EIS?

A. Section 1502.14(e) requires the section of the EIS on alternatives to "identify the agency's preferred alternative if one or more exists, in the draft statement, and identify such alternative in the final statement . . ." This means that if the agency has a preferred alternative at the Draft EIS stage, that alternative must be labeled or identified as such in the Draft EIS. If the responsible federal official in fact has no preferred alternative at the Draft EIS stage, a preferred alternative need not be identified there. By the time the Final EIS is filed, Section 1502.14(e) presumes the existence of a preferred alternative and requires its identification in the Final EIS "unless another law prohibits the expression of such a preference."

4c. Q. Who recommends or determines the "preferred alternative?"

A. The lead agency's official with line responsibility for preparing the EIS and assuring its adequacy is responsible for identifying the agency's preferred alternative(s). The NEPA regulations do not dictate which official in an agency shall be responsible for preparation of EISs, but agencies can identify this official in their implementing procedures, pursuant to Section 1507.3.

Even though the agency's preferred alternative is identified by the EIS preparer in the EIS, the statement must be objectively prepared and not slanted to support the choice of the agency's preferred alternative over the other reasonable and feasible alternatives.

5a. Q. Is the "proposed action" the same thing as the "preferred alternative"?

A. The "proposed action" may be, but is not necessarily, the agency's "preferred alternative." The proposed action may be a proposal in its initial form before undergoing analysis in the EIS process. If the proposed action is internally generated, such as preparing a land management plan, the proposed action might end up as the agency's preferred alternative. On the other hand the proposed action may be granting an application to a non-federal entity for a permit. The agency may or may not have a "preferred alternative" at the Draft EIS stage (see Question 4 above). In that case the agency may decide at the Final EIS stage, on the basis of the Draft EIS and the public and agency comments, that an alternative other than the proposed action is the agency's "preferred alternative."

5b. Q. Is the analysis of the "proposed action" in an EIS to be treated differently from the analysis of alternatives?

A. The degree of analysis devoted to each alternative in the EIS is to be substantially similar to that devoted to the "proposed action." Section 1502.14 is titled "Alternatives including the proposed action" to reflect such comparable treatment. Section 1502.14(b) specifically requires "substantial treatment" in the EIS of each alternative including the proposed action. This regulation does not dictate an *amount* of information to be provided, but rather, prescribes a *level of treatment,* which may in turn require varying amounts of information, to enable a reviewer to evaluate and compare alternatives.

6a. Q. What is the meaning of the term "environmentally preferable alternative" as used in the regulations with reference to Records of Decision? How is the term "environment" used in the phrase?

A. Section 1505.2(b) requires that, in cases where an EIS has been prepared, the Record of Decision (ROD) must identify all alternatives that were considered, ". . . specifying the alternative or alternatives which were considered to be environmentally preferable." The environmentally preferable alternative is the alternative that will promote the national environmental policy as expressed in NEPA's Section 101. Ordinarily, this means the alternative that causes the least damage to the biological and physical environment; it also means the alternative which best protects, preserves, and enhances historic, cultural, and natural resources.

The Council recognizes that the identification of the environmentally preferable alternative may involve difficult judgments, particularly when one environmental value must be balanced against another. The public and other agencies reviewing a Draft EIS can assist the lead agency to develop and determine environmentally preferable alternatives by providing their views in comments on the Draft EIS. Through the identification of the environmentally preferable alternative, the decisionmaker is clearly faced with a choice between that alternative and others, and must consider whether the decision accords with the Congressionally declared policies of the Act.

6b. Q. Who recommends or determines what is environmentally preferable?

A. The agency EIS staff is encouraged to make recommendations of the environmentally preferable alternative(s) during EIS preparation. In any event the lead agency official responsible for the EIS is encouraged to identify the environmentally preferable alternative(s) in the EIS. In all cases, commentors from other agencies and the public are also encouraged to address this question. The agency must identify the environmentally preferable alternative in the ROD.

7. Q. What is the difference between the sections in the EIS on "alternatives" and "environmental consequences"? How do you avoid duplicating the discussion of alternatives in preparing these two sections?

A. The "alternatives" section is the heart of the EIS. This section rigorously explores and objectively evaluates all reasonable alternatives including the proposed action. Section 1502.14. It should include relevant comparisons on environmental and other grounds. The "environmental consequences" section of the EIS discusses the specific environmental impacts or effects of each of the alternatives including the proposed action. Section 1502.16. In order to avoid duplication between these two sections, most of the "alternatives" section should be devoted to describing and comparing the alternatives. Discussion of the environmental impacts of these alternatives should be limited to a concise descriptive summary of such impacts in a comparative form, including charts or tables, thus sharply defining the issues and providing a clear basis for choice among options. Section 1502.14. The "environmental consequences" section should be devoted largely to a scientific analysis of the direct and indirect environmental effects of the proposed action and of each of the alternatives. It forms the analytic basis for the concise comparison in the "alternatives" section.

8. Q. Section 1501.2(d) of the NEPA regulations requires agencies to provide for the early application of NEPA to cases where actions are planned by private applicants or non-Federal entities and are, at some stage, subject to federal approval of permits, loans, loan guarantees, insurance or other actions. What must and can agencies do to apply NEPA early in these cases?

A. Section 1501.2(d) requires federal agencies to take steps toward ensuring that private parties and state and local entities initiate environmental studies as soon as federal involvement in their proposals can be foreseen. This section is intended to ensure that environmental factors are considered at an early stage in the planning process and to avoid the situation where the applicant for a federal permit or approval has completed planning and eliminated all alternatives to the proposed action by the time the EIS process commences or before the EIS process has been completed.

Through early consultation, business applicants and approving agencies may gain better appreciation of each other's needs and foster a decisionmaking process which avoids later unexpected confrontations.

Federal agencies are required by Section 1507.3(b) to develop procedures to carry out Section 1501.2(d). The procedures should include an "outreach program", such as a means for prospective applicants to conduct pre-application consultations with the lead and cooperating agencies. Applicants need to find out, in advance of project planning, what environmental studies or other information will be required, and what mitigation requirements are likely, in connecton with the later federal NEPA process. Agencies should designate staff to advise potential applicants of the agency's NEPA information requirements and should publicize their pre-application procedures and information requirements in newsletters or other media used by potential applicants.

Complementing Section 1501.2(d), Section 1506.5(a) requires agencies to assist applicants by outlining the types of information required in those cases where the agency requires the applicant to submit environmental data for possible use by the agency in preparing an EIS.

Section 1506.5(b) allows agencies to authorize preparation of environmental assessments by applicants. Thus, the procedures should also include a means for anticipating and utilizing applicants' environmental studies or "early corporate environmental assessments" to fulfill some of the federal agency's NEPA obligations. However, in such cases the agency must still evaluate independently the environmental issues and take responsibility for the environmental assessment.

These provisions are intended to encourage and enable private and other non-federal entities to build environmental considerations into their own planning processes in a way that facilitates the application of NEPA and avoids delay.

9. Q. To what extent must an agency inquire into whether an applicant for a federal permit, funding or other approval of a proposal will also need approval from another agency for the same proposal or some other related aspect of it?

A. Agencies must integrate the NEPA process into other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts. Specifically, the agency must "provide for cases where actions are planned by . . . applicants," so that designated staff are available to advise potential applicants of studies or other information that will foreseeably be required for the later federal action; the agency shall consult with the applicant if the agency foresees its own involvement in the proposal; and it shall insure that the NEPA process commences at the earliest possible time. Section 1501.2(d). (See Question 8.)

The regulations emphasize agency cooperation early in the NEPA process. Section 1501.6. Section 1501.7 on "scoping" also provides that all affected Federal agencies are to be invited to participate in scoping the environmental issues and to identify the various environmental review and consultation requirements that may apply to the proposed action. Further, Section 1502.25(b) requires that the draft EIS list all the federal permits, licenses and other entitlements that are needed to implement the proposal.

These provisions create an affirmative obligation on federal agencies to inquire early, and to the maximum degree possible, to ascertain whether an applicant is or will be seeking other federal assistance or approval, or whether the applicant is waiting until a proposal has been substantially developed before requesting federal aid or approval.

Thus, a federal agency receiving a request for approval or assistance should determine whether the applicant has filed separate requests for federal approval or assistance with other federal agencies. Other federal agencies that are likely to become involved should then be contacted, and the NEPA process coordinated, to insure an early and comprehensive analysis of the direct and indirect effects of the proposal and any related actions. The agency should inform the applicant that action on its application may be delayed unless it submits all other federal applications (where feasible to do so), so that all the relevant agencies can work together on the scoping process and preparation of the EIS.

10a. Q. What actions by agencies and/or applicants are allowed during EIS preparation and during the 30-day review period after publication of a final EIS?

A. No federal decision on the proposed action shall be made or recorded until at least 30 days after the publication by EPA of notice that the particular EIS has been filed with EPA. Sections 1505.2 and 1506.10. Section 1505.2 requires this decision to be stated in a public Record of Decision.

Until the agency issues its Record of Decision, no action by an agency or an applicant concerning the proposal shall be taken which would have an adverse environmental impact or limit the choice of reasonable alternatives. Section 1506.1(a). But this does not preclude preliminary planning or design work which is needed *to support an application* for permits or assistance. Section 1506.1(d).

When the impact statement in question is a program EIS, no major action concerning the program may be taken which may significantly affect the quality of the human environment, unless the particular action is justified independently of the program, is accompanied by its own adequate environmental impact statement and will not prejudice the ultimate decision on the program. Section 1506.1(c).

10b. Q. Do these limitations on action (described in Question 10a) apply to state or local agencies that have statutorily delegated responsibility for preparation of environmental documents required by NEPA, for example, under the HUD Block Grant program?

A. Yes, these limitations do apply, without any variation from their application to federal agencies.

11. Q. What actions must a lead agency take during the NEPA process when it becomes aware that a non-federal applicant is about to take an action within the agency's jurisdiction that would either have an adverse environmental impact or limit the choice of reasonable alternatives (e.g., prematurely commit money or other resources towards the completion of the proposal)?

A. The federal agency must notify the applicant that the agency will take strong affirmative steps to insure that the objectives and procedures of NEPA are fulfilled. Section 1506.1(b). These steps could include seeking injunctive measures under NEPA, or the use of sanctions available under either the agency's permitting authority or statutes setting forth the agency's statutory mission. For example, the agency might advise an applicant that if it takes such action the agency will not process its application.

12a. Q. What actions are subject to the Council's new regulations, and what actions are grandfathered under the old guidelines?

A. The effective date of the Council's regulations was July 30, 1979 (except for certain HUD programs under the Housing and Community Development Act, 42 U.S.C. 5304(h), and certain state highway programs that qualify under Section 102(2)(D) of NEPA for which the regulations became effective on November 30, 1979). All the provisions of the regulations are binding as of that date, including those covering decisionmaking, public participation, referrals, limitations on actions, EIS supplements, etc. For example, a Record of Decision would be prepared even for decisions where the draft EIS was filed before July 30, 1979.

But in determining whether or not the new regulations apply to the preparation of a *particular environmental document*, the relevant factor is the date of filing of the draft of that document. Thus, the new regulations do not require the redrafting of an EIS or supplement if the draft EIS or supplement was filed before July 30, 1979. However, a supplement prepared after the effective date of the regulations for an EIS issued in final before the effective date of the regulations would be controlled by the regulations.

Even though agencies are not required to apply the regulations to an EIS or other document for which the draft was filed prior to July 30, 1979, the regulations encourage agencies to follow the regulations "to the fullest extent practicable," i.e., if it is feasible to do so, in preparing the final document. Section 1506.12(a).

12b. Q. Are projects authorized by Congress before the effective date of the Council's regulations grandfathered?

A. No. The date of Congressional authorization for a project is not determinative of whether the Council's regulations or former Guidelines apply to the particular proposal. No incomplete projects or proposals of any kind are grandfathered in whole or in part. Only certain environmental documents, for which the draft was issued before the effective date of the regulations, are grandfathered and subject to the Council's former Guidelines.

12c. Q. Can a violation of the regulations give rise to a cause of action?

A. While a trivial violation of the regulations would not give rise to an independent cause of action, such a cause of action would arise from a substantial violation of the regulations. Section 1500.3.

13. Q. Can the scoping process be used in connection with preparation of an environmental assessment, i.e., before both the decision to proceed with an EIS and publication of a notice of intent?

A. Yes. Scoping can be a useful tool for discovering alternatives to a proposal, or significant impacts that may have been overlooked. In cases where an environmental assessment is being prepared to help an agency decide whether to prepare an EIS, useful information might result from early participation by other agencies and the public in a scoping process.

The regulations state that the scoping process is to be preceded by a Notice of Intent (NOI) to prepare an EIS. But that is only the minimum requirement. Scoping may be initiated earlier, as long as there is appropriate public notice and enough information available on the proposal so that the public and relevant agencies can participate effectively.

However, scoping that is done before the assessment, and in aid of its preparation, cannot *substitute* for the normal scoping process after publication of the NOI, unless the earlier public notice stated clearly that this possibility was under consideration, *and* the NOI expressly provides that written comments on the scope of alternatives and impacts will still be considered.

14a. Q. What are the respective rights and responsibilities of lead and cooperating agencies? What letters and memoranda must be prepared?

A. After a lead agency has been designated (Sec. 1501.5), that agency has the responsibility to solicit cooperation from other federal agencies that have jurisdiction by law or special expertise on any environmental issue that should be addressed in the EIS being prepared. Where appropriate, the lead agency should seek the cooperation of state or local agencies of similar qualifications. When the proposal may affect an Indian reservation, the agency should consult with the Indian tribe. Section 1508.5. The request for cooperation should come at the earliest possible time in the NEPA process.

After discussions with the candidate cooperating agencies, the lead agency and the cooperating agencies are to determine by letter or by memorandum which agencies will undertake cooperating responsibilities. To the extent possible at this stage, responsibilities for specific issues should be assigned. The allocation of responsibilities will be completed during scoping. Section 1501.7(a)(4).

Cooperating agencies must assume responsibility for the development of information and the preparation of environmental analyses at the request of the lead agency. Section 1501.6(b)(3). Cooperating agencies are now required by Section 1501.6 to devote staff resources that were normally primarily used to critique or comment on the Draft EIS after its preparation, much earlier in the NEPA process—primarily at the scoping and Draft EIS preparation stages. If a cooperating agency determines that its resource limitations preclude any involvement, or the degree of involvement (amount of work) requested by the lead agency, it must so inform the lead agency in writing and submit a copy of this correspondence to the Council. Section 1501.6(c).

In other words, the potential cooperating agency must decide early if it is able to devote any of its resources to a particular proposal. For this reason the regulation states that an agency may reply to a request for cooperation that "other program commitments preclude any involvement or the degree of involvement requested in the *action* that is the subject of the environmental impact statement." (Emphasis added). The regulation refers to the "action," rather than to the EIS, to clarify that the agency is taking itself out of all phases of the federal action, not just draft EIS preparation. This means that the agency has determined that it cannot be involved in the later stages of EIS review and comment, as well as decisionmaking on the proposed action. For this reason, cooperating agencies with jurisdiction by law (those which have permitting or other approval authority) cannot opt out entirely of the duty to cooperate on the EIS. See also Question 15, relating specifically to the responsibility of EPA.

14b. Q. How are disputes resolved between lead and cooperating agencies concerning the scope and level of detail of analysis and the quality of data in impact statements?

A. Such disputes are resolved by the agencies themselves. A lead agency, of course, has the ultimate responsibility for the content of an EIS. But it is supposed to use the environmental analysis and recommendations of cooperating agencies with jurisdiction by law or special expertise to the maximum extent possible, consistent with its own responsibilities as lead agency. Section 1501.6(a)(2).

If the lead agency leaves out a significant issue or ignores the advice and expertise of the cooperating agency, the EIS may be found later to be inadequate. Similarly, where cooperating agencies have their own decisions to make and they intend to adopt the environmental impact statement and base their decisions on it, one document should include all of the information necessary for the decisions by the cooperating agencies. Otherwise they may be forced to duplicate the EIS process by issuing a new, more complete EIS or Supplemental EIS, even though the original EIS could have sufficed if it had been properly done at the outset. Thus, both lead and cooperating agencies have a stake in producing a document of good quality. Cooperating agencies also have a duty to participate fully in the scoping process to ensure that the appropriate range of issues is determined early in the EIS process.

Because the EIS is not the Record of Decision, but instead constitutes the *information* and *analysis* on which to base a decision, disagreements about conclusions to be drawn from the EIS need not inhibit agencies from issuing a joint document, or adopting another agency's EIS, if the analysis is adequate. Thus, if each agency has its own "preferred alternative," both can be identified in the EIS. Similarly, a cooperating agency with jurisdiction by law may determine in its own ROD that alternative A is the environmentally preferable action, even though the lead agency has decided in its separate ROD that Alternative B is environmentally preferable.

14c. Q. What are the specific responsibilities of federal and state cooperating agencies to review draft EISs?

A. Cooperating agencies (i.e., agencies with jurisdiction by law or special expertise) and agencies that are authorized to develop or enforce environmental standards, must comment on environmental impact statements within their jurisdiction, expertise or authority. Sections 1503.2, 1508.5. If a cooperating agency is satisfied that its views are adequately reflected in the environmental impact statement, it should simply comment accordingly. Conversely, if the cooperating agency determines that a draft EIS is incomplete, inadequate or inaccurate, or it has other comments, it should promptly make such comments, conforming to the requirements of specificity in section 1503.3.

14d. Q. How is the lead agency to treat the comments of another agency with jurisdiction by law or special expertise which has failed or refused to cooperate or participate in scoping or EIS preparation?

A. A lead agency has the responsibility to respond to all substantive comments raising significant issues regarding a draft EIS. Section 1503.4. However, cooperating agencies are generally under an obligation to raise issues or otherwise participate in the EIS process during scoping and EIS preparation if they reasonably can do so. In practical terms, if a cooperating agency fails to cooperate at the outset, such as during scoping, it will find that its comments at a later stage will not be as persuasive to the lead agency.

15. Q. Are EPA's responsibilities to review and comment on the environmental effects of agency proposals under Section 309 of the Clean Air Act independent of its responsibility as a cooperating agency?

A. Yes. EPA has an obligation under Section 309 of the Clean Air Act to review and comment in writing on the environmental impact of any matter relating to the authority of the Administrator contained in proposed legislation, federal construction projects, other federal actions requiring EISs, and new regulations. 42 U.S.C. Sec. 7609. This obligation is independent of its role as a cooperating agency under the NEPA regulations.

16. Q. What is meant by the term "third party contracts" in connection with the preparation of an EIS? See Section 1506.5(c). When can "third party contracts" be used?

A. As used by EPA and other agencies, the term "third party contract" refers to the preparation of EISs by contractors paid by the applicant. In the case of an EIS for a National Pollution Discharge Elimination System (NPDES) permit, the applicant, aware in the early planning stages of the proposed project of the need for an EIS, contracts directly with a consulting firm for its preparation. See 40 C.F.R. 6.604(g). The "third party" is EPA which, under Section 1506.5(c), must select the consulting firm, even though the applicant pays for the cost of preparing the EIS. The consulting firm is responsible to EPA for preparing an EIS that meets the requirements of the NEPA regulations and EPA's NEPA procedures. It is in the applicant's interest that the EIS comply with the law so that EPA can take prompt action on the NPDES permit application. The "third party contract" method under EPA's NEPA procedures is purely voluntary, though most applicants have found it helpful in expediting compliance with NEPA.

If a federal agency uses "third party contracting," the applicant may undertake the necessary paperwork for the solicitation of a field of candidates under the agency's direction, so long as the agency complies with Section 1506.5(c). Federal procurement requirements do not apply to the agency because it incurs no obligations or costs under the contract, nor does the agency procure anything under the contract.

17a. Q. If an EIS is prepared with the assistance of a consulting firm, the firm must execute a disclosure statement. What criteria must the firm follow in determining whether it has any "financial or other interest in the outcome of the project" which would cause a conflict of interest?

A. Section 1506.5(c), which specifies that a consulting firm preparing an EIS must execute a disclosure statement, does not define "financial or other interest in the outcome of the project." The Council interprets this term broadly to cover any known benefits other than general enhancement of professional reputation. This includes any financial benefit such as a promise of future construction or design work on the project, as well as indirect benefits the consultant is aware of (e.g., if the project would aid proposals sponsored by the firm's other clients). For example, completion of a highway project may encourage construction of a shopping center or industrial park from which the consultant stands to benefit. If a consulting firm is aware that it has such an interest in the decision on the proposal, it should be disqualified from preparing the EIS, to preserve the objectivity and integrity of the NEPA process.

When a consulting firm has been involved in developing initial data and plans for the project, but does not have any financial or other interest in the outcome of the decision, it need not be disqualified from preparing the EIS. However, a disclosure statement in the draft EIS should clearly state the scope and extent of the firm's prior involvement to expose any potential conflicts of interest that may exist.

17b. Q. If the firm in fact has no promise of future work or other interest in the outcome of the proposal, may the firm later bid in competition with others for future work on the project if the proposed action is approved?

A. Yes.

18. Q. How should uncertainties about indirect effects of a proposal be addressed, for example, in cases of disposal of federal lands, when the identity or plans of future landowners is unknown?

A. The EIS must identify all the indirect effects that are known, and make a good faith effort to explain the effects that are not known but are "reasonably foreseeable." Section 1508.8(b). In the example, if there is total uncertainty about the identity of future land owners or the nature of future land uses, then of course, the agency is not required to engage in speculation or contemplation about their future plans. But, in the ordinary course of business, people do make judgments based upon reasonably foreseeable occurrences. It will often be possible to consider the likely purchasers and the development trends in that area or similar areas in recent years; or the likelihood that the land will be used for an energy project, shopping center, subdivision, farm or factory. The agency has the responsibility to make an informed judgment, and to estimate future impacts on that basis, especially if trends are ascertainable or potential purchasers have made themselves known. The agency cannot ignore these uncertain, but probable, effects of its decisions.

19a. Q. What is the scope of mitigation measures that must be discussed?

A. The mitigation measures discussed in an EIS must cover the range of impacts of the proposal. The measures must include such things as design alternatives that would decrease pollution emissions, construction impacts, esthetic intrusion, as well as relocation assistance, possible land use controls that could be enacted, and other possible efforts. Mitigation measures must be considered even for impacts that by themselves would not be considered "significant." Once the proposal itself is considered as a whole to have significant effects, all of its specific effects on the environment (whether or not "significant") must be considered, and mitigation measures must be developed where it is feasible to do so. Sections 1502.14(f), 1502.16(h), 1508.14.

19b. Q. How should an EIS treat the subject of available mitigation measures that are (1) outside the jurisdiction of the lead or cooperating agencies, or (2) unlikely to be adopted or enforced by the responsible agency?

A. All relevant, reasonable mitigation measures that could improve the project are to be identified, even if they are outside the jurisdiction of the lead agency or the cooperating agencies, and thus would not be committed as part of the RODs of these agencies. Sections 1502.16(h), 1505.2(c). This will serve to alert agencies or officials who *can* implement these extra measures, and will encourage them to do so. Because the EIS is the most comprehensive environmental document, it is an ideal vehicle in which to lay out not only the full range of environmental impacts but also the full spectrum of appropriate mitigation.

However, to ensure that environmental effects of a proposed action are fairly assessed, the probability of the mitigation measures being implemented must also be discussed. Thus the EIS and the Record of Decision should indicate the likelihood that such measures will be adopted or enforced by the responsible agencies. Sections 1502.16(h), 1505.2. If there is a history of nonenforcement or opposition to such measures, the EIS and Record of Decision should acknowledge such opposition or nonenforcement. If the necessary mitigation measures will not be ready for a long period of time, this fact, of course, should also be recognized.

Note: Answer to Questions 20 has been rescinded. See 51 Fed. Reg. 15625, April 25, 1986.

21. Q. Where an EIS or an EA is combined with another project planning document (sometimes called "piggybacking"), to what degree may the EIS or EA refer to and rely upon information in the project document to satisfy NEPA's requirements?

A. Section 1502.25 of the regulations requires that draft EISs be prepared concurrently and integrated with environmental analyses and related surveys and studies required by other federal statutes. In addition, Section 1506.4 allows any environmental document prepared in compliance with NEPA to be combined with any other agency document to reduce duplication and paperwork. However, these provisions were not intended to authorize the preparation of a short summary or outline EIS, attached to a detailed project report or land use plan containing the required environmental impact data. In such circumstances, the reader would have to refer constantly to the detailed report to understand the environmental impacts and alternatives which should have been found in the EIS itself.

The EIS must stand on its own as an analytical document which fully informs decisionmakers and the public of the environmental effects of the proposal and those of the reasonable alternatives. Section 1502.1. But, as long as the EIS is clearly identified and is self-supporting, it can be physically included in or attached to the project report or land use plan, and may use attached report material as technical backup.

Forest Service environmental impact statements for forest management plans are handled in this manner. The EIS identifies the agency's preferred alternative, which is developed in detail as the proposed management plan. The detailed proposed plan accompanies the EIS through the review process, and the documents are appropriately cross-referenced. The proposed plan is useful for EIS readers as an example, to show how one choice of management options translates into effects on natural resources. This procedure permits initiation of the 90-day public review of proposed forest plans, which is required by the National Forest Management Act.

All the alternatives are discussed in the EIS, which can be read as an independent document. The details of the management plan are not repeated in the EIS, and vice versa. This is a reasonable functional separation of the documents: the EIS contains information relevant to the choice among alternatives; the plan is a detailed description of proposed management activities suitable for use by the land managers. This procedure provides for concurrent compliance with the public review requirements of both NEPA and the National Forest Management Act.

Under some circumstances, a project report or management plan may be totally merged with the EIS, and the one document labeled as both "EIS" and "management plan" or "project report." This may be reasonable where the documents are short, or where the EIS format and the regulations for clear, analytical EISs also satisfy the requirements for a project report.

22. Q. May state and federal agencies serve as joint lead agencies? If so, how do they resolve law, policy and resource conflicts under NEPA and the relevant state environmental policy act? How do they resolve differences in perspective where, for example, national and local needs may differ?

A. Under Section 1501.5(b), federal, state or local agencies, as long as they include at least one federal agency, may act as joint lead agencies to prepare an EIS. Section 1506.2 also strongly urges state and local agencies and the relevant federal agencies to cooperate fully with each other. This should cover joint research and studies, planning activities, public hearings, environmental assessments and the preparation of joint EISs under NEPA and the relevant "little NEPA" state laws, so that one document will satisfy both laws.

The regulations also recognize that certain inconsistencies may exist between the proposed federal action and any approved state or local plan or law. The joint document should discuss the extent to which the federal agency would reconcile its proposed action with such plan or law. Section 1506.2(d). (See Question 23).

Because there may be differences in perspective as well as conflicts among federal, state and local goals for resources management, the Council has advised participating agencies to adopt a flexible, cooperative approach. The joint EIS should reflect all of their interests and missions, clearly identified as such. The final document would then indicate how state and local interests have been accommodated, or would identify conflicts in goals (e.g., how a hydroelectric project, which might induce second home development, would require new land use controls). The EIS must contain a complete discussion of scope and purpose of the proposal, alternatives, and impacts so that the discussion is adequate to meet the needs of local, state and federal decisionmakers.

23a. Q. How should an agency handle potential conflicts between a proposal and the objectives of Federal, state or local land use plans, policies and controls for the area concerned? See Sec. 1502.16(c).

A. The agency should first inquire of other agencies whether there are any potential conflicts. If there would be immediate conflicts, or if conflicts could arise in the future when the plans are finished (see Question 23(b) below), the EIS must acknowledge and describe the extent of those conflicts. If there are any possibilities of resolving the conflicts, these should be explained as well. The EIS should also evaluate the seriousness of the impact of the proposal on the land use plans and policies, and whether, or how much, the proposal will impair the effectiveness of land use control mechanisms for the area. Comments from officials of the affected area should be solicited early and should be carefully acknowleged and answered in the EIS.

23b. Q. What constitutes a "land use plan or policy" for purposes of this discussion?

A. The term "land use plans," includes all types of formally adopted documents for land use planning, zoning and related regulatory requirements. Local general plans are included, even though they are subject to future change. Proposed plans should also be addressed if they have been formally proposed by the appropriate government body in a written form, and are being actively pursued by officials of the jurisdiction. Staged plans, which must go through phases of development such as the Water Resources Council's Level A, B and C planning process should also be included even though they are incomplete.

The term "policies" includes formally adopted statements of land use policy as embodied in laws or regulations. It also includes proposals for action such as the initiation of a planning process, or a formally adopted policy statement of the local, regional or state executive branch, even if it has not yet been formally adopted by the local, regional or state legislative body.

23c. Q. What options are available for the decisionmaker when conflicts with such plans or policies are identified?

A. After identifying any potential land use conflicts, the decisionmaker must weigh the significance of the conflicts, among all the other environmental and non-environmental factors that must be considered in reaching a rational and balanced decision. Unless precluded by other law from causing or contributing to any inconsistency with the land use plans, policies or controls, the decisionmaker retains the authority to go forward with the proposal, despite the potential conflict. In the Record of Decision, the decisionmaker must explain what the decision was, how it was made, and what mitigation measures are being imposed to lessen adverse environmental impacts of the proposal, among the other requirements of Section 1505.2. This provision would require the decisionmaker to explain any decision to override land use plans, policies or controls for the area.

24a. Q. When are EISs required on policies, plans or programs?

A. An EIS must be prepared if an

agency proposes to implement a specific policy, to adopt a plan for a group of related actions, or to implement a specific statutory program or executive directive. Section 1508.18. In addition, the adoption of official policy in the form of rules, regulations and interpretations pursuant to the Administrative Procedure Act, treaties, conventions, or other formal documents establishing governmental or agency policy which will substantially alter agency programs, could require an EIS. Section 1508.18. In all cases, the policy, plan, or program must have the potential for significantly affecting the quality of the human environment in order to require an EIS. It should be noted that a proposal "may exist in fact as well as by agency declaration that one exists." Section 1508.23.

24b. Q. When is an area-wide or overview EIS appropriate?

A. The preparation of an area-wide or overview EIS may be particularly useful when similar actions, viewed with other reasonably foreseeable or proposed agency actions, share common timing or geography. For example, when a variety of energy projects may be located in a single watershed, or when a series of new energy technologies may be developed through federal funding, the overview or area-wide EIS would serve as a valuable and necessary analysis of the affected environment and the potential cumulative impacts of the reasonably foreseeable actions under that program or within that geographical area.

24c. Q. What is the function of tiering in such cases?

A. Tiering is a procedure which allows an agency to avoid duplication of paperwork through the incorporation by reference of the general discussions and relevant specific discussions from an environmental impact statement of broader scope into one of lesser scope or vice versa. In the example given in Question 24b, this would mean that an overview EIS would be prepared for all of the energy activities reasonably foreseeable in a particular geographic area or resulting from a particular development program. This impact statement would be followed by site-specific or project-specific EISs. The tiering process would make each EIS of greater use and meaning to the public as the plan or program develops, without duplication of the analysis prepared for the previous impact statement.

25a. Q. When is it appropriate to use appendices instead of including information in the body of an EIS?

A. The body of the EIS should be a succinct statement of all the information on environmental impacts and alternatives that the decisionmaker and the public need, in order to make the decision and to ascertain that every significant factor has been examined. The EIS must explain or summarize methodologies of research and modeling, and the results of research that may have been conducted to analyze impacts and alternatives.

Lengthy technical discussions of modeling methodology, baseline studies, or other work are best reserved for the appendix. In other words, if only technically trained individuals are likely to understand a particular discussion then it should go in the appendix, and a plain language summary of the analysis and conclusions of that technical discussion should go in the text of the EIS.

The final statement must also contain the agency's responses to comments on the draft EIS. These responses will be primarily in the form of changes in the document itself, but specific answers to each significant comment should also be included. These specific responses may be placed in an appendix. If the comments are especially voluminous, summaries of the comments and responses will suffice. (See Question 29 regarding the level of detail required for responses to comments.)

25b. Q. How does an appendix differ from incorporation by reference?

A. First, if at all possible, the appendix accompanies the EIS, whereas the material which is incorporated by reference does not accompany the EIS. Thus the appendix should contain information that reviewers will be likely to want to examine. The appendix should include material that pertains to preparation of a particular EIS. Research papers directly relevant to the proposal, lists of affected species, discussion of the methodology of models used in the analysis of impacts, extremely detailed responses to comments, or other information, would be placed in the appendix.

The appendix must be complete and available at the time the EIS is filed. Five copies of the appendix must be sent to EPA with five copies of the EIS for filing. If the appendix is too bulky to be circulated, it instead must be placed in conveniently accessible locations or furnished directly to commentors upon request. If it is not circulated with the EIS, the Notice of Availability published by EPA must so state, giving a telephone number to enable potential commentors to locate or request copies of the appendix promptly.

Material that is not directly related to preparation of the EIS should be incorporated by reference. This would include other EISs, research papers in the general literature, technical background papers or other material that someone with technical training could use to evaluate the analysis of the proposal. These must be made available, either by citing the literature, furnishing copies to central locations, or sending copies directly to commentors upon request.

Care must be taken in all cases to ensure that material incorporated by reference, and the occasional appendix that does not accompany the EIS, are in fact available for the full minimum public comment period.

26a. Q. How detailed must an EIS index be?

A. The EIS index should have a level of detail sufficient to focus on areas of the EIS of reasonable interest to any reader. It cannot be restricted to the most important topics. On the other hand, it need not identify every conceivable term or phrase in the EIS. If an agency believes that the reader is reasonably likely to be interested in a topic, it should be included.

26b. Q. Is a keyword index required?

A. No. A keyword index is a relatively short list of descriptive terms that identifies the key concepts or subject areas in a document. For example it could consist of 20 terms which describe the most significant aspects of an EIS that a future researcher would need: type of proposal, type of impacts, type of environment, geographical area, sampling or modelling methodologies used. This technique permits the compilation of EIS data banks, by facilitating quick and inexpensive access to stored materials. While a keyword index is not required by the regulations, it could be a useful addition for several reasons. First, it can be useful as a quick index for reviewers of the EIS, helping to focus on areas of interest. Second, if an agency keeps a listing of the keyword indexes of the EISs it produces, the EIS preparers themselves will have quick access to similar research data and methodologies to aid their future EIS work. Third, a keyword index will be needed to make an EIS available to future researchers using EIS data banks that are being developed. Preparation of such an index now when the document is produced will save a later effort when the data banks become operational.

27a. Q. If a consultant is used in preparing an EIS, must the list of preparers identify members of the consulting firm as well as the agency NEPA staff who were primarily responsible?

A. Section 1502.17 requires identification of the names and qualifications of persons who were primarily responsible for preparing the EIS or significant background papers, including basic components of the statement. This means that members of a consulting firm preparing material that is to become part of the EIS must be identified. The EIS should identify these individuals even though the consultant's contribution may have been modified by the agency.

27b. Q. Should agency staff involved in reviewing and editing the EIS also be included in the list of preparers?

A. Agency personnel who wrote basic components of the EIS or significant background papers must, of course, be identified. The EIS should also list the technical editors who reviewed or edited the statements.

27c. Q. How much information should be included on each person listed?

A. The list of preparers should normally not exceed two pages. Therefore, agencies must determine which individuals had *primary* responsibility and need not identify individuals with minor involvement. The list of preparers should include a very brief identification of the individuals involved, their qualifications (expertise, professional disciplines) and the specific portion of the EIS for which they are responsible. This may be done in tabular form to cut down on length. A line or two for each person's qualifications should be sufficient.

28. Q. May an agency file xerox copies of an EIS with EPA pending the completion of printing the document?

A. Xerox copies of an EIS may be filed with EPA prior to printing only if the xerox copies are simultaneously made available to other agencies and the public. Section 1506.9 of the regulations, which governs EIS filing, specifically requires Federal agencies to file EISs with EPA no earlier than the EIS is distributed to the public. However, this section does not prohibit xeroxing as a form of reproduction and distribution. When an agency chooses xeroxing as the reproduction method, the EIS must be clear and legible to permit ease of reading and ultimate microfiching of the EIS. Where color graphs are important to the EIS, they should be reproduced and circulated with the xeroxed copy.

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29a Q. What response must an agency provide to a comment on a draft EIS which states that the EIS's methodology is inadequate or inadequately explained? For example, what level of detail must an agency include in its response to a simple postcard comment making such an allegation?

A. Appropriate responses to comments are described in Section 1503.4. Normally the responses should result in changes in the text of the EIS, not simply a separate answer at the back of the document. But, in addition, the agency must state what its response was, and if the agency decides that no substantive response to a comment is necessary, it must explain briefly why.

An agency is not under an obligation to issue a lengthy reiteration of its methodology for any portion of an EIS if the only comment addressing the methodology is a simple complaint that the EIS methodology is inadequate. But agencies must respond to comments, however brief, which are specific in their criticism of agency methodology. For example, if a commentor on an EIS said that an agency's air quality dispersion analysis or methodology was inadequate, and the agency had included a discussion of that analysis in the EIS, little if anything need be added in response to such a comment. However, if the commentor said that the dispersion analysis was inadequate because of its use of a certain computational technique, or that a dispersion analysis was inadequately explained because computational techniques were not included or referenced, then the agency would have to respond in a substantive and meaningful way to such a comment.

If a number of comments are identical or very similar, agencies may group the comments and prepare a single answer for each group. Comments may be summarized if they are especially voluminous. The comments or summaries must be attached to the EIS regardless of whether the agency believes they merit individual discussion in the body of the final EIS.

29b. Q. How must an agency respond to a comment on a draft EIS that raises a new alternative not previously considered in the draft EIS?

A. This question might arise in several possible situations. First, a commentor on a draft EIS may indicate that there is a possible alternative which, in the agency's view, is not a reasonable alternative. Section 1502.14(a). If that is the case, the agency must explain why the comment does not warrant further agency response, citing authorities or reasons that support the agency's position and, if appropriate, indicate those circumstances which would trigger agency reappraisal or further response. Section 1503.4(a). For example, a commentor on a draft EIS on a coal fired power plant may suggest the alternative of using synthetic fuel. The agency may reject the alternative with a brief discussion (with authorities) of the unavailability of synthetic fuel within the time frame necessary to meet the need and purpose of the proposed facility.

A second possibility is that an agency may receive a comment indicating that a particular alternative, while reasonable, should be modified somewhat, for example, to achieve certain mitigation benefits, or for other reasons. If the modification is reasonable, the agency should include a discussion of it in the final EIS. For example, a commentor on a draft EIS on a proposal for a pumped storage power facility might suggest that the applicant's proposed alternative should be enhanced by the addition of certain reasonable mitigation measures, including the purchase and setaside of a wildlife preserve to substitute for the tract to be destroyed by the project. The modified alternative including the additional mitigation measures should be discussed by the agency in the final EIS.

A third slightly different possibility is that a comment on a draft EIS will raise an alternative which is a minor variation of one of the alternatives discussed in the draft EIS, but this variation was not given any consideration by the agency. In such a case, the agency should develop and evaluate the new alternative, if it is reasonable, in the final EIS. If it is qualitatively within the spectrum of alternatives that were discussed in the draft, a supplemental draft will not be needed. For example, a commentor on a draft EIS to designate a wilderness area within a National Forest might reasonably identify a specific tract of the forest, and urge that it be considered for designation. If the draft EIS considered designation of a range of alternative tracts which encompassed forest area of similar quality and quantity, no supplemental EIS would have to be prepared. The agency could fulfill its obligation by addressing that specific alternative in the final EIS.

As another example, an EIS on an urban housing project may analyze the alternatives of constructing 2,000, 4,000, or 6,000 units. A commentor on the draft EIS might urge the consideration of constructing 5,000 units utilizing a different configuration of buildings. This alternative is within the spectrum of alternatives already considered, and, therefore, could be addressed in the final EIS.

A fourth possibility is that a commentor points out an alternative which is not a variation of the proposal or of any alternative discussed in the draft impact statement, and is a reasonable alternative that warrants serious agency response. In such a case, the agency must issue a supplement to the draft EIS that discusses this new alternative. For example, a commentor on a draft EIS on a nuclear power plant might suggest that a reasonable alternative for meeting the projected need for power would be through peak load management and energy conservation programs. If the permitting agency has failed to consider that approach in the Draft EIS, and the approach cannot be dismissed by the agency as unreasonable, a supplement to the Draft EIS, which discusses that alternative, must be prepared. (If necessary, the same supplement should also discuss substantial changes in the proposed action or significant new circumstances or information, as required by Section 1502.9(c)(1) of the Council's regulations.)

If the new alternative was not raised by the commentor during scoping, but could have been, commentors may find that they are unpersuasive in their efforts to have their suggested alternative analyzed in detail by the agency. However, if the new alternative is discovered or developed later, and it could not reasonably have been raised during the scoping process, then the agency must address it in a supplemental draft EIS. The agency is, in any case, ultimately responsible for preparing an adequate EIS that considers all alternatives.

30. Q. When a cooperating agency with jurisdiction by law intends to adopt a lead agency's EIS and it is not satisfied with the adequacy of the document, may the cooperating agency adopt only the part of the EIS with which it is satisfied? If so, would a cooperating agency with jurisdiction by law have to prepare a separate EIS or EIS supplement covering the areas of disagreement with the lead agency?

A. Generally, a cooperating agency may adopt a lead agency's EIS without recirculating it if it concludes that its NEPA requirements and its comments and suggestions have been satisfied. Section 1506.3(a), (c). If necessary, a cooperating agency may adopt only a portion of the lead agency's EIS and may reject that part of the EIS with which it disagrees, stating publicly why it did so. Section 1506.3(a).

A cooperating agency with jurisidiction by law (e.g., an agency with independent legal responsibilities with respect to the proposal) has an independent legal obligation to comply with NEPA. Therefore, if the cooperating agency determines that the EIS is wrong or inadequate, it must prepare a supplement to the EIS, replacing or adding any needed information, and must circulate the supplement as a draft for public and agency review and comment. A final supplemental EIS would be required before the agency could take action. The adopted portions of the lead agency EIS should be circulated with the supplement. Section 1506.3(b). A cooperating agency with jurisdiction by law will have to prepare its own Record of Decision for its action, in which it must explain how it reached its conclusions. Each agency should explain how and why its conclusions differ, if that is the case, from those of other agencies which issued their Records of Decision earlier.

An agency that did not cooperate in preparation of an EIS may also adopt an EIS or portion thereof. But this would arise only in rare instances, because an agency adopting an EIS for use in its own decision normally would have been a cooperating agency. If the proposed action for which the EIS was prepared is substantially the same as the proposed action of the adopting agency, the EIS may be adopted as long as it is recirculated as a final EIS and the agency announces what it is doing. This would be followed by the 30-day review period and issuance of a Record of Decision by the adopting agency. If the proposed action by the adopting agency is not substantially the same as that in the EIS (i.e., if an EIS on one action is being adapted for use in a decision on another action), the EIS would be treated as a draft and circulated for the normal public comment period and other procedures. Section 1506.3(b).

31a. Q. Do the Council's NEPA regulations apply to independent regulatory agencies like the Federal Energy Regulatory Commission (FERC) and the Nuclear Regulatory Commission?

A. The statutory requirements of NEPA's Section 102 apply to "all agencies of the federal government." The NEPA regulations implement the procedural provisions of NEPA as set forth in NEPA's Section 102(2) for all agencies of the federal government. The NEPA regulations apply to independent regulatory agencies, however, they do not direct independent regulatory agencies or other agencies to make decisions in any particular way or in a way inconsistent with an agency's statutory charter. Sections 1500.3, 1500.6, 1507.1, and 1507.3.

31b. Q. Can an Executive Branch agency like the Department of the Interior adopt an EIS prepared by an independent regulatory agency such as FERC?

A. If an independent regulatory agency such as FERC has prepared an EIS in connection with its approval of a proposed project, an Executive Branch agency (e.g., the Bureau of Land Management in the Department of the Interior) may, in accordance with Section 1506.3, adopt the EIS or a portion thereof for its use in considering the same proposal. In such a case the EIS must, to the satisfaction of the adopting agency, meet the standards for an adequate statement under the NEPA regulations (including scope and quality of analysis of alternatives) and must satisfy the adopting agency's comments and suggestions. If the independent regulatory agency fails to comply with the NEPA regulations, the cooperating or adopting agency may find that it is unable to adopt the EIS, thus forcing the preparation of a new EIS or EIS Supplement for the same action. The NEPA regulations were made applicable to all federal agencies in order to avoid this result, and to achieve uniform application and efficiency of the NEPA process.

32. Q. Under what circumstances do old EISs have to be supplemented before taking action on a proposal?

A. As a rule of thumb, if the proposal has not yet been implemented, or if the EIS concerns an ongoing program, EISs that are more than 5 years old should be carefully reexamined to determine if the criteria in Section 1502.9 compel preparation of an EIS supplement.

If an agency has made a substantial change in a proposed action that is relevant to environmental concerns, or if there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts, a supplemental EIS must be prepared for an old EIS so that the agency has the best possible information to make any necessary substantive changes in its decisions regarding the proposal. Section 1502.9(c).

33a. Q. When must a referral of an interagency disagreement be made to the Council?

A. The Council's referral procedure is a *pre-decision* referral process for interagency disagreements. Hence, Section 1504.3 requires that a referring agency must deliver its referral to the Council not later than 25 days after publication by EPA of notice that the final EIS is available (unless the lead agency grants an extension of time under Section 1504.3(b)).

33b. Q. May a referral be made after this issuance of a Record of Decision?

A. No, except for cases where agencies provide an internal appeal procedure which permits simultaneous filing of the final EIS and the record of decision (ROD). Section 1506.10(b)(2).

Otherwise, as stated above, the process is a pre-decision referral process. Referrals must be made within 25 days after the notice of availability of the final EIS, whereas the final decision (ROD) may not be made or filed until after 30 days from the notice of availability of the EIS. Sections 1504.3(b), 1506.10(b). If a lead agency has granted an extension of time for another agency to take action on a referral, the ROD may not be issued until the extension has expired.

34a. Q. Must Records of Decision (RODs) be made public? How should they be made available?

A. Under the regulations, agencies must prepare a "concise *public* record of decision," which contains the elements specified in Section 1505.2. This public record may be integrated into any other decision record prepared by the agency, or it may be separate if decision documents are not normally made public. The Record of Decision is intended by the Council to be an environmental document (even though it is not explicitly mentioned in the definition of "environmental document" in Section 1508.10). Therefore, it must be made available to the public through appropriate public notice as required by Section 1506.6(b). However, there is no specific requirement for publication of the ROD itself, either in the Federal Register or elsewhere.

34b. Q. May the summary section in the final Environmental Impact Statement substitute for or constitute an agency's Record of Decision?

A. No. An environmental impact statement is supposed to inform the decisionmaker before the decision is made. Sections 1502.1, 1505.2. The Council's regulations provide for a 30-day period after notice is published that the final EIS has been filed with EPA before the agency may take final action. During that period, in addition to the agency's own internal final review, the public and other agencies can comment on the final EIS prior to the agency's final action on the proposal. In addition, the Council's regulations make clear that the requirements for the summary in an EIS are not the same as the requirements for a ROD. Sections 1502.12 and 1505.2.

34c. Q. What provisions should Records of Decision contain pertaining to mitigation and monitoring?

A. Lead agencies "shall include appropriate conditions [including mitigation measures and monitoring and enforcement programs] in grants, permits or other approvals" and shall "condition funding of actions on mitigation." Section 1505.3. Any such measures that are adopted must be explained and committed in the ROD.

The reasonable alternative mitigation measures and monitoring programs should have been addressed in the draft and final EIS. The discussion of mitigation and monitoring in a Record of Decision must be more detailed than a general statement that mitigation is being required, but not so detailed as to duplicate discussion of mitigation in the EIS. The Record of Decision should contain a concise summary identification of the mitigation measures which the agency has committed itself to adopt.

The Record of Decision must also state whether all practicable mitigation measures have been adopted, and if not, why not. Section 1505.2(c). The Record of Decision must identify the mitigation measures and monitoring and enforcement programs that have been selected and plainly indicate that they are adopted as part of the agency's decision. If the proposed action is the issuance of a permit or other approval, the specific details of the mitigation measures shall then be included as appropriate conditions in whatever grants, permits, funding or other approvals are being made by the federal agency. Section 1505.3 (a), (b). If the proposal is to be carried out by the federal agency itself, the Record of Decision should delineate the mitigation and monitoring measures in sufficient detail to constitute an enforceable commitment, or incorporate by reference the portions of the EIS that do so.

34d. Q. What is the enforceability of a Record of Decision?

A. Pursuant to generally recognized principles of federal administrative law, agencies will be held accountable for preparing Records of Decision that conform to the decisions actually made and for carrying out the actions set forth in the Records of Decision. This is based on the principle that an agency must comply with its own decisons and regulations once they are adopted. Thus, the terms of a Record of Decision are enforceable by agencies and private parties. A Record of Decision can be used to compel compliance with or execution of the mitigation measures identified therein.

35. Q. How long should the NEPA process take to complete?

A. When an EIS is required, the process obviously will take longer than when an EA is the only document prepared. But the Council's NEPA regulations encourage streamlined review, adoption of deadlines, elimination of duplicative work, eliciting suggested alternatives and other comments early through scoping, cooperation among agencies, and consultation with applicants during project planning. The Council has advised agencies that under the new NEPA regulations even large complex energy projects would require only about 12 months for the completion of the entire EIS process. For most major actions, this period is well within the planning time that is needed in any event, apart from NEPA.

The time required for the preparation of program EISs may be greater. The Council also recognizes that some projects will entail difficult long-term planning and/or the acquisition of certain data which of necessity will require more time for the preparation of the EIS. Indeed, some proposals should be given more time for the thoughtful preparation of an EIS and development of a decision which fulfills NEPA's substantive goals.

For cases in which only an environmental assessment will be prepared, the NEPA process should take no more than 3 months, and in many cases substantially less, as part of the normal analysis and approval process for the action.

36a. Q. How long and detailed must an environmental assessment (EA) be?

A. The environmental assessment is a concise public document which has three defined functions. (1) It briefly provides sufficient evidence and analysis for determining whether to prepare an EIS; (2) it aids an agency's compliance with NEPA when no EIS is necessary, i.e., it helps to identify better alternatives and mitigation measures; and (3) it facilitates preparation of an EIS when one is necessary. Section 1508.9(a).

Since the EA is a concise document, it should not contain long descriptions or detailed data which the agency may have gathered. Rather, it should contain a brief discussion of the need for the proposal, alternatives to the proposal, the environmental impacts of the proposed action and alternatives, and a list of agencies and persons consulted. Section 1508.9(b).

While the regulations do not contain page limits for EA's, the Council has generally advised agencies to keep the length of EAs to not more than approximately 10–15 pages. Some agencies expressly provide page guidelines (e.g., 10–15 pages in the case of the Army Corps). To avoid undue length, the EA may incorporate by reference background data to support its concise discussion of the proposal and relevant issues.

36b. Q. Under what circumstances is a lengthy EA appropriate?

A. Agencies should avoid preparing lengthy EAs except in unusual cases, where a proposal is so complex that a concise document cannot meet the goals of Section 1508.9 *and* where it is extremely difficult to determine whether the proposal could have significant environmental effects. In most cases, however, a lengthy EA indicates that an EIS is needed.

37a. Q. What is the level of detail of information that must be included in a finding of no significant impact (FONSI)?

A. The FONSI is a document in which the agency briefly explains the reasons why an action will not have a significant effect on the human environment and, therefore, why an EIS will not be prepared. Section 1508.13. The finding itself need not be detailed, but must succinctly state the reasons for deciding that the action will have no significant environmental effects, and, if relevant, must show which factors were weighted most heavily in the determination. In addition to this statement, the FONSI must include, summarize, or attach and incorporate by reference, the environmental assessment.

37b. Q. What are the criteria for deciding whether a FONSI should be made available for public review for 30 days before the agency's final determination whether to prepare an EIS?

A. Public review is necessary, for example, (a) if the proposal is a borderline case, i.e., when there is a reasonable argument for preparation of an EIS; (b) if it is an unusual case, a new kind of action, or a precedent setting case such as a first intrusion of even a minor development into a pristine area; (c) when there is either scientific or public controversy over the proposal; or (d) when it involves a proposal which is or is closely similar to one which normally requires preparation of an EIS. Sections 1501.4(e)(2), 1508.27. Agencies also must allow a period of public review of the FONSI if the proposed action would be located in a floodplain or wetland. E.O. 11988, Sec. 2(a)(4); E.O. 11990, Sec. 2(b).

38. Q. Must (EAs) and FONSIs be made public? If so, how should this be done?

A. Yes, they must be available to the public. Section 1506.6 requires agencies to involve the public in implementing their NEPA procedures, and this includes public involvement in the preparation of EAs and FONSIs. These are public "environmental documents" under Section 1506.6(b), and, therefore, agencies must give public notice of their availability. A combination of methods may be used to give notice, and the methods should be tailored to the needs of particular cases. Thus, a Federal Register notice of availability of the documents, coupled with notices in national publications and mailed to interested national groups might be appropriate for proposals that are national in scope. Local newspaper notices may be more appropriate for regional or site-specific proposals.

The objective, however, is to notify all interested or affected parties. If this is not being achieved, then the methods should be reevaluated and changed. Repeated failure to reach the interested or affected public would be interpreted as a violation of the regulations.

39. Q. Can an EA and FONSI be used to impose enforceable mitigation measures, monitoring programs, or other requirements, even though there is no requirement in the regulations in such cases for a formal Record of Decision?

A. Yes. In cases where an environmental assessment is the appropriate environmental document, there still may be mitigation measures or alternatives that would be desirable to consider and adopt even though the impacts of the proposal will not be "significant." In such cases, the EA should include a discussion of these measures or alternatives to "assist agency planning and decisionmaking" and to "aid an agency's compliance with [NEPA] when no environmental impact statement is necessary." Section 1501.3(b), 1508.9(a)(2). The appropriate mitigation measures can be imposed as enforceable permit conditions, or adopted as part of the agency final decision in the same manner mitigation measures are adopted in the formal Record of Decision that is required in EIS cases.

40. Q. If an environmental assessment indicates that the environmental effects of a proposal are significant but that, with mitigation, those effects may be reduced to less than significant levels, may the agency make a finding of no significant impact rather than prepare an EIS? Is that a legitimate function of an EA and scoping?

A. Mitigation measures may be relied upon to make a finding of no significant impact only if they are imposed by statute or regulation, or submitted by an applicant or agency as part of the original proposal. As a general rule, the regulations contemplate that agencies should use a broad approach in defining significance and should not rely on the possibility of mitigation as an excuse to avoid the EIS requirement. Sections 1508.8, 1508.27.

If a proposal appears to have adverse effects which would be significant, and certain mitigation measures are then developed during the scoping or EA stages, the existence of such *possible* mitigation does not obviate the need for an EIS. Therefore, if scoping or the EA identifies certain mitigation possibilities without altering the nature of the overall proposal itself, the agency should continue the EIS process and submit the proposal, and the potential mitigation, for public and agency review and comment. This is essential to ensure that the final decision is based on all the relevant factors and that the full NEPA process will result in enforceable mitigation measures through the Record of Decision.

In some instances, where the proposal itself so integrates mitigation from the beginning that it is impossible to define the proposal without including the mitigation, the agency may then rely on the mitigation measures in determining that the overall effects would not be significant (e.g., where an application for a permit for a small hydro dam is based on a binding commitment to build fish ladders, to permit adequate down stream flow, and to replace any lost wetlands, wildlife habitat and recreational potential). In those instances, agencies should make the FONSI and EA available for 30 days of public comment before taking action. Section 1501.4(e)(2).

Similarly, scoping may result in a redefinition of the entire project, as a result of mitigation proposals. In that case, the agency may alter its previous decision to do an EIS, as long as the agency or applicant resubmits the entire proposal and the EA and FONSI are available for 30 days of review and comment. One example of this would be where the size and location of a proposed industrial park are changed to avoid affecting a nearby wetland area.

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MEMORANDUM FOR GENERAL COUNSELS, NEPA LIAISONS, AND PARTICIPANTS IN SCOPING

Council on Environmental Quality
April 1981

MEMORANDUM FOR GENERAL COUNSELS, NEPA LIAISONS AND PARTICIPANTS IN SCOPING

SUBJECT: Scoping Guidance

As part of its continuing oversight of the implementation of the NEPA regulations, the Council on Environmental Quality has been investigating agency experience with scoping. This is the process by which the scope of the issues and alternatives to be examined in an EIS is determined. In a project led by Barbara Bramble of the General Counsel's staff, the Council asked federal agencies to report their scoping experiences; Council staff held meetings and workshops in all regions of the country to discuss scoping practice; and a contract study was performed for the Council to investigate what techniques work best for various kinds of proposals.

Out of this material has been distilled a series of recommendations for successfully conducting scoping. The attached guidance document consists of advice on what works and what does not, based on the experience of many agencies and other participants in scoping. It contains no new legal requirements beyond those in the NEPA regulations. It is intended to make generally available the results of the Council's research, and to encourage the use of better techniques for ensuring public participation and efficiency in the scoping process.

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SCOPING GUIDANCE

I. Introduction

A. Background of this document.

In 1978, with the publication of the proposed NEPA regulations (since adopted as formal rules, 40 C.F.R. Parts 1500-1508), the Council on Environmental Quality gave formal recognition to an increasingly used term — scoping. Scoping is an idea that has long been familiar to those involved in NEPA compliance: In order to manage effectively the preparation of an environmental impact statement (EIS), one must determine the scope of the document — that is, what will be covered, and in what detail. Planning of this kind was a normal component of EIS preparation. But the consideration of issues and choice of alternatives to be examined was in too many cases completed outside of public view. The innovative approach to scoping in the regulations is that the process is open to the public and state and local governments, as well as to affected federal agencies. This open process gives rise to important new opportunities for better and more efficient NEPA analyses, and simultaneously places new responsibilities on public and agency participants alike to surface their concerns early. Scoping helps insure that real problems are identified early and properly studied; that issues that are of no concern do not consume time and effort; that the draft statement when first made public is balanced and thorough; and that the delays occasioned by re-doing an inadequate draft are avoided. Scoping does not create problems that did not already exist; it ensures that problems that would have been raised anyway are identified early in the process.

Many members of the public as well as agency staffs engaged in the NEPA process have told the Council that the open scoping requirement is one of the most far-reaching changes engendered by the NEPA regulations. They have predicted that scoping could have a profound positive effect on environmental analyses, on the impact statement process itself, and ultimately on decisionmaking.

Because the concept of open scoping was new, the Council decided to encourage agencies' innovation without unduly restrictive guidance. Thus the regulations relating to scoping are very simple. They state that "there shall be an early and open process for determining the scope of issues to be addressed" which "shall be termed scoping," but they lay down few specific requirements. (Section 1501.7*). They require an open process with public notice; identification of significant and insignificant issues; allocation of EIS preparation assignments; identification of related analysis requirements in order to avoid duplication of work; and the planning of a schedule for EIS preparation that meshes with the agency's decisionmaking

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* All citations are to the NEPA regulations, 40 C.F.R. Parts 1500-1508 unless otherwise specified.

schedule. (Section 1501.7(a)). The regulations encourage, but do not require, setting time limits and page limits for the EIS, and holding scoping meetings. (Section 1501.7(b)). Aside from these general outlines, the regulations left the agencies on their own. The Council did not believe, and still does not, that it is necessary or appropriate to dictate the specific manner in which over 100 federal agencies should deal with the public. However, the Council has received several requests for more guidance. In 1980 we decided to investigate the agency and public response to the scoping requirement, to find out what was working and what was not, and to share this with all agencies and the public.

The Council first conducted its own survey, asking federal agencies to report some of their scoping experiences. The Council then contracted with the American Arbitration Association and Clark McGlennon Associates to survey the scoping techniques of major agencies and to study several innovative methods in detail.* Council staff conducted a two-day workshop in Atlanta in June 1980, to discuss with federal agency NEPA staff and several EIS contractors what seems to work best in scoping of different types of proposals, and discussed scoping with federal, state and local officials in meetings in all 10 federal regions.

This document is a distillation of all the work that has been done so far by many people to identify valuable scoping techniques. It is offered as a guide to encourage success and to help avoid pitfalls. Since scoping methods are still evolving, the Council welcomes any comments on this guide, and may add to it or revise it in coming years.

B. What scoping is and what it can do.

Scoping is often the first contact between proponents of a proposal and the public. This fact is the source of the power of scoping and of the trepidation that it sometimes evokes. If a scoping meeting is held, people on both sides of an issue will be in the same room and, if all goes well, will speak to each other. The possibilities that flow from this situation are vast. Therefore, a large portion of this document is devoted to the productive management of meetings and the de-fusing of possible heated disagreements.

Even if a meeting is not held, the scoping process leads EIS preparers to think about the proposal early on, in order to explain it to the public and affected agencies. The participants respond with their own concerns about significant issues and suggestions of alternatives. Thus as the draft EIS is prepared, it will include, from the beginning, a reflection or at least an acknowledgement of the cooperating agencies' and the public's concerns. This reduces the need for changes after the draft is finished, because it reduces the chances of overlooking a significant issue or reasonable alternative. It also in many cases increases public confidence in NEPA and thedecisionmaking process, thereby reducing delays, such as from litigation, later on when implementing the decisions. As we will discuss further in this document, the public generally responds positively when its views are taken seriously, even if they cannot be wholly accomodated.

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* The results of this examination are reported in "Scoping the Content of EISs: An Evaluation of Agencies' Experiences," which is available from the Council or the Resource Planning Analysis Office of the U.S. Geological Survey, 750 National Center, Reston, Va. 22092.

But scoping is not simply another "public relations" meeting requirement. It has specific and fairly limited objectives: (a) to identify the affected public and agency concerns; (b) to facilitate an efficient EIS preparation process, through assembling the cooperating agencies, assigning EIS writing tasks, ascertaining all the related permits and reviews that must be scheduled concurrently, and setting time or page limits; (c) to define the issues and alternatives that will be examined in detail in the EIS while simultaneously devoting less attention and time to issues which cause no concern; and (d) to save time in the overall process by helping to ensure that draft statements adequately address relevant issues, reducing the possibility that new comments will cause a statement to be rewritten or supplemented.

Sometimes the scoping process enables early identification of a few serious problems with a proposal, which can be changed or solved because the proposal is still being developed. In these cases, scoping the EIS can actually lead to the solution of a conflict over the proposed action itself. We have found that this extra benefit of scoping occurs fairly frequently. But it cannot be expected in most cases, and scoping can still be considered successful when conflicts are clarified but not solved. This guide does not presume that resolution of conflicts over proposals is a principal goal of scoping, because it is only possible in limited circumstances. Instead, the Council views the principal goal of scoping to be an adequate and efficiently prepared EIS. Our suggestions and recommendations are aimed at reducing the conflicts among affected interests that impede this limited objective. But we are aware of the possibilities of more general conflict resolution that are inherent in any productive discussions among interested parties. We urge all participants in scoping processes to be alert to this larger context, in which scoping could prove to be the first step in environmental problem-solving.

Scoping can lay a firm foundation for the rest of the decisionmaking process. If the EIS can be relied upon to include all the necessary information for formulating policies and making rational choices, the agency will be better able to make a sound and prompt decision. In addition, if it is clear that all reasonable alternatives are being seriously considered, the public will usually be more satisfied with the choice among them.

II. Advice for Government Agencies Conducting Scoping

A. General context.

Scoping is a process, not an event or a meeting. It continues throughout the planning for an EIS, and may involve a series of meetings, telephone conversations, or written comments from different interested groups. Because it is a process, participants must remain flexible. The scope of an EIS occasionally may need to be modified later if a new issue surfaces, no matter how thorough the scoping was. But it makes sense to try to set the scope of the statement as early as possible.

Scoping may identify people who already have knowledge about a site or an alternative proposal or a relevant study, and induce them to make it available. This can save a lot of research time and money. But people will not come forward unless they believe their views and materials will receive serious consideration. Thus scoping is a crucial first step toward building public confidence in a fair environmental analysis and ultimately a fair decisionmaking process.

One further point to remember: the lead agency cannot shed its responsibility to assess each significant impact or alternative even if one is found after scoping. But anyone who hangs back and fails to raise something that reasonably could have been raised earlier on will have a hard time prevailing during later stages of the NEPA process or if litigation ensues. Thus a thorough scoping process does provide some protection against subsequent lawsuits.

B. Step-by-step through the process.

1. Start scoping after you have enough information.

Scoping cannot be useful until the agency knows enough about the proposed action to identify most of the affected parties, and to present a coherent proposal and a suggested initial list of environmental issues and alternatives. Until that time there is no way to explain to the public or other agencies what you want them to get involved in. So the first stage is to gather preliminary information from the applicant, or to compose a clear picture of your proposal, if it is being developed by the agency.

2. Prepare an information packet.

In many cases, scoping of the EIS has been preceded by preparation of an environmental assessment (EA) as the basis for the decision to proceed with an EIS. In such cases, the EA will, of course, include the preliminary information that is needed.

If you have not prepared an EA, you should put together a brief information packet consisting of a description of the proposal, an initial list of impacts and alternatives, maps, drawings, and any other material or references that can help the interested public to understand what is being proposed. The proposed work plan of the EIS is not usually sufficient for this purpose. Such documents rarely contain a description of the goals of the proposal to enable readers to develop alternatives.

At this stage, the purpose of the information is to enable participants to make an intelligent contribution to scoping the EIS. Because they will be helping to plan what will be examined during the environmental review, they need to know where you are now in that planning process.

Include in the packet a brief explanation of what scoping is, and what procedure will be used, to give potential participants a context for their involvement. Be sure to point out that you want comments from participants on very specific matters. Also reiterate that no decision has yet been made on the contents of the EIS, much less on the proposal itself. Thus, explain that you do not yet have a preferred alternative, but that you may identify the preferred alternative in the draft EIS. (See Section 1502.14(e)). This should reduce the tendency of participants to perceive the proposal as already a definite plan. Encourage them to focus on recommendations for improvements to the various alternatives.

Some of the complaints alleging that scoping can be a waste of time stem from the fact that the participants may not know what the proposal is until they arrive at a meeting. Even the most intelligent among us can rarely make useful, substantive comments on the spur of the moment. Don't expect helpful suggestions to result if participants are put in such a position.

3. Design the scoping process for each project.

There is no established or required procedure for scoping. The process can be carried out by meetings, telephone conversations, written comments, or a combination of all three. It is important to tailor the type, the timing and the location of public and agency comments to the proposal at hand.

For example, a proposal to adopt a land management plan for a National Forest in a sparsely populated region may not lend itself to calling a single meeting in a central location. While people living in the area and elsewhere may be interested, any meeting place will be inconvenient for most of the potential participants. One solution is to distribute the information packet, solicit written comments, list a telephone number with the name of the scoping coordinator, and invite comments to be phoned in. Otherwise, small meetings in several locations may be necessary when face-to-face communication is important.

In another case, a site-specific construction project may be proposed. This would be a better candidate for a central scoping meeting. But you must first find out if anyone would be interested in attending such a meeting. If you simply assume that a meeting is necessary, you may hire a hall and a stenographer, assemble your staff for a meeting, and find that nobody shows up. There are many proposals that just do not generate sufficient public interest to cause people to attend another public meeting. So a wise early step is to contact known local citizens groups and civic leaders.

In addition, you may suggest in your initial scoping notice and information packet that all those who desire a meeting should call to request one. That way you will only hear from those who are seriously interested in attending.

The question of where to hold a meeting is a difficult one in many cases. Except for site specific construction projects, it may be unclear where the interested parties can be found. For example, an EIS on a major energy development program may involve policy issues and alternatives to the program that are of interest to public groups all over the nation, and to agencies headquartered in Washington, D.C., while the physical impacts might be expected to be felt most strongly in a particular region of the country. In such a case, if personal contact is desired, several meetings would be necessary, especially in the affected region and in Washington, to enable all interests to be heard.

As a general guide, unless a proposal has no site specific impacts, scoping meetings should not be confined to Washington. Agencies should try to elicit the views of people who are closer to the affected regions.

The key is to be flexible. It may not be possible to plan the whole scoping process at the outset, unless you know who all the potential players are. You can start with written comments, move on to an informal meeting, and hold further meetings if desired.

There are several reasons to hold a scoping meeting. First, some of the best effects of scoping stem from the fact that all parties have the opportunity to meet one another and to listen to the concerns of the others. There is no satisfactory substitute for personal contact to achieve this result. If there is any possibility that resolution of underlying conflicts over a proposal may be achieved, this is always enhanced by the development of personal and working relationships among the parties.

Second, even in a conflict situation people usually respond positively when they are treated as partners in the project review process. If they feel confident that their views were actually heard and taken seriously, they will be more likely to be satisfied that the decisionmaking process was fair even if they disagree with the outcome. It is much easier to show people that you are listening to them if you hold a face-to-face meeting where they can see you writing down their points, than if their only contact is through written comments.

If you suspect that a particular proposal could benefit from a meeting with the affected public at any time during its review, the best time to have the meeting is during this early scoping stage. The fact that you are willing to discuss openly a proposal before you have committed substantial resources to it will often enhance the chances for reaching an accord.

If you decide that a public meeting is appropriate, you still must decide what type of meeting, or how many meetings, to hold. We will discuss meetings in detail below in "Conducting a Public Meeting." But as part of designing the scoping process, you must decide between a single meeting and multiple ones for different interest groups, and whether to hold a separate meeting for government agency participants.

The single large public meeting brings together all the interested parties, which has both advantages and disadvantages. If the meeting is efficiently run, you can cover a lot of interests and issues in a short time. And a single meeting does reduce agency travel time and expense. In some cases it may be an advantage to have all interest groups hear each others' concerns, possibly promoting compromise. It is definitely important to have the staffs of the cooperating agencies, as well as the lead agency, hear the public views of what the significant issues are; and it will be difficult and expensive for the cooperating agencies to attend several meetings. But if there are opposing groups of citizens who feel strongly on both sides of an issue, the setting of the large meeting may needlessly create tension and an emotional confrontation between the groups. Moreover, some people may feel intimidated in such a setting, and won't express themselves at all.

The principal drawback of the large meeting, however, is that it is generally unwieldy. To keep order, discussion is limited, dialogue is difficult, and often all participants are frustrated, agency and public alike. Large meetings can serve to identify the interest groups for future discussion, but often little else is accomplished. Large meetings often become "events" where grandstanding substitutes for substantive comments. Many agencies resort to a formal hearing-type format to maintain control, and this can cause resentments among participants who come to the meeting expecting a responsive discussion.

For these reasons, we recommend that meetings be kept small and informal, and that you hold several, if necessary, to accomodate the different interest groups. The other solution is to break a large gathering into small discussion groups, which is discussed below. Using either method increases the likelihood that participants will level with you and communicate their underlying concerns rather than make an emotional statement just for effect.

Moreover, in our experience, a separate meeting for cooperating agencies is quite productive. Working relationships can be forged for the effective participation of all involved in the preparation of the EIS. Work assignments are made by the lead agency, a schedule may be set for production of parts of the draft EIS, and information gaps can be identified early. But a productive meeting such as this is not possible at the very beginning of the process. It can only result from the same sort of planning and preparation that goes into the public meetings. We discuss below the special problems of cooperating agencies, and their information needs for effective participation in scoping.

4. Issuing the public notice.

The preliminary look at the proposal, in which you develop the information packet discussed above, will enable you to tell what kind of public notice will be most appropriate and effective.

Section 1501.7 of the NEPA regulations requires that a notice of intent to prepare an EIS must be published in the Federal Register prior to initiating scoping.* This means that one of the appropriate means of giving

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* Several agencies have found it useful to conduct scoping for environmental assessments. EAs are prepared where answering the question of whether an EIS is necessary requires identification of significant environmental issues; and consideration of alternatives in an EA can often be useful even where an EIS is not necessary. In both situations scoping can be valuable. Thus the Council has stated that scoping may be used in connection with preparation of an EA, that is, before publishing any notice of intent to prepare an EIS. As in normal scoping, appropriate public notice is required, as well as adequate information on the proposal to make scoping worthwhile. But scoping at this early stage cannot substitute for the normal scoping process unless the earlier public notice stated clearly that this would be the case, and the notice of intent expressly provides that written comments suggesting impacts and alternatives for study will still be considered.

public notice of the upcoming scoping process could be the same Federal Register notice. And because the notice of intent must be published anyway, the scoping notice would be essentially free. But use of the Federal Register is not an absolute requirement, and other means of public notice often are more effective, including local newspapers, radio and TV, posting notices in public places, etc. (See Section 1506.6 of the regulations.)

What is important is that the notice actually reach the affected public. If the proposal is an important new national policy in which national environmental groups can be expected to be interested, these groups can be contacted by form letter with ease. (See the Conservation Directory for a list of national groups.**). Similarly, for proposals that may have major implications for the business community, trade associations can be helpful means of alerting affected groups. The Federal Register notice can be relied upon to notify others that you did not know about. But the Federal Register is of little use for reaching individuals or local groups interested in a site specific proposal. Therefore notices in local papers, letters to local government officials and personal contact with a few known interested individuals would be more appropriate. Land owners abutting any proposed project site should be notified individually.

Remember that issuing press releases to newspapers, and radio and TV stations is not enough, because they may not be used by the media unless the proposal is considered "newsworthy." If the proposal is controversial, you can try alerting reporters or editors to an upcoming scoping meeting for coverage in special weekend sections used by many papers. But placing a notice in the legal notices section of the paper is the only guarantee that it will be published.

5. Conducting a public meeting.

In our study of agency practice in conducting scoping, the most interesting information on what works and doesn't work involves the conduct of meetings. Innovative techniques have been developed, and experience shows that these can be successful.

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One of the most important factors turns out to be the training and experience of the moderator. The U.S. Office of Personnel Management and others give training courses on how to run a meeting effectively. Specific techniques are taught to keep the meeting on course and to deal with confrontations. These techniques are sometimes called "meeting facilitation skills."

When holding a meeting, the principle thing to remember about scoping is that it is a process to initiate preparation of an EIS. It is not concerned with the ultimate decision on the proposal. A fruitful scoping process leads to an adequate environmental analysis, including all reasonable

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** The Conservation Directory is a publication of the National Wildlife Federation, 1421 16th St., N.W., Washington, D.C. 20036, $4.00.

alternatives and mitigation measures. This limited goal is in the interest of all the participants, and thus offers the possibility of agreement by the parties on this much at least. To run a successful meeting you must keep the focus on this positive purpose.

At the point of scoping therefore, in one sense all the parties involved have a common goal, which is a thorough environmental review. If you emphasize this in the meeting you can stop any grandstanding speeches without a heavy hand, by simply asking the speaker if he or she has any concrete suggestions for the group on issues to be covered in the EIS. By frequently drawing the meeting back to this central purpose of scoping, the opponents of a proposal will see that you have not already made a decision, and they will be forced to deal with the real issues. In addition, when people see that you are genuinely seeking their opinion, some will volunteer useful information about a particular subject or site that they may know better than anyone on your staff.

As we stated above, we found that informal meetings in small groups are the most satisfactory for eliciting useful issues and information. Small groups can be formed in two ways: you can invite different interest groups to different meetings, or you can break a large number into small groups for discussion.

One successful model is used by the Army Corps of Engineers, among others. In cases where a public meeting is desired, it is publicized and scheduled for a location that will be convenient for as many potential participants as possible. The information packet is made available in several ways, by sending it to those known to be interested, giving a telephone number in the public notices for use in requesting one, and providing more at the door of the meeting place as well. As participants enter the door, each is given a number. Participants are asked to register their name, address and/or telephone number for use in future contact during scoping and the rest of the NEPA process.

The first part of the meeting is devoted to a discussion of the proposal in general, covering its purpose, proposed location, design, and any other aspects that can be presented in a lecture format. A question and answer period concerning this information is often held at this time. Then if there are more than 15 or 20 attendees at the meeting, the next step is to break it into small groups for more intensive discussion. At this point, the numbers held by the participants are used to assign them to small groups by sequence, random drawing, or any other method. Each group should be no larger than 12, and 8-10 is better. The groups are informed that their task is to prepare a list of significant environmental issues and reasonable alternatives for analysis in the EIS. These lists will be presented to the main group and combined into a master list, after the discussion groups are finished. The rules for how priorities are to be assigned to the issues identified by each group should be made clear before the large group breaks up.

Some agencies ask each group member to vote for the 5 or 10 most important issues. After tallying the votes of individual members, each group would only report out those issues that received a certain number of votes. In this way only those items of most concern to the members would even make the list compiled by each group. Some agencies go further, and only let each group report out the top few issues identified. But you must be careful not to ignore issues that may be considered a medium priority by many people. They may still be important, even if not in the top rank. Thus instead of simply voting, the members of the groups should rank the listed issues in order of perceived importance. Points may be assigned to each item on the basis of the rankings by each member, so that the group can compile a list of its issues in priority order. Each group should then be asked to assign cut-off numbers to separate high, medium and low priority items. Each group should then report out to the main meeting all of its issues, but with priorities clearly assigned.

One member of the lead agency or cooperating agency staff should join each group to answer questions and to listen to the participants' expressions of concern. It has been the experience of many of those who have tried this method that it is better not to have the agency person lead the group discussions. There does need to be a leader, who should be chosen by the group members. In this way, the agency staff member will not be perceived as forcing his opinions on the others.

If the agency has a sufficient staff of formally trained "meeting facilitators," they may be able to achieve the same result even where agency staff people lead the discussion groups. But absent such training, the staff should not lead the discussion groups. A good technique is to have the agency person serve as the recording secretary for the group, writing down each impact and alternative that is suggested for study by the participants. This enhances the neutral status of the agency representative, and ensures that he is perceived as listening and reacting to the views of the group. Frequently, the recording of issues is done with a large pad mounted on the wall like a blackboard, which has been well received by agency and public alike, because all can see that the views expressed actually have been heard and understood.

When the issues are listed, each must be clarified or combined with others to eliminate duplication or fuzzy concepts. The agency staff person can actually lead in this effort because of his need to reflect on paper exactly what the issues are. After the group has listed all the environmental impacts and alternatives and any other issues that the members wish to have considered, they are asked to discuss the relative merits and importance of each listed item. The group should be reminded that one of its tasks is to eliminate insignificant issues. Following this, the members assign priorities or vote using one of the methods described above.

The discussion groups are then to return to the large meeting to report on the results of their ranking. At this point further discussion may be useful to seek a concensus on which issues are really insignificant. But the moderator must not appear to be ruthlessly eliminating issues that the participants ranked of high or medium importance. The best that can usually be achieved is to "deemphasize" some of them, by placing them in the low priority category.

6. What to do with the comments.

After you have comments from the cooperating agencies and the interested public, you must evaluate them and make judgments about which issues are in fact significant and which ones are not. The decision of what the EIS should contain is ultimately made by the lead agency. But you will now know what the interested participants consider to be the principal areas for study and analysis. You should be guided by these concerns, or be prepared to briefly explain why you do not agree. Every issue that is raised as a priority matter during scoping should be addressed in some manner in the EIS, either by in-depth analysis, or at least a short explanation showing that the issue was examined, but not considered significant for one or more reasons.

Some agencies have complained that the time savings claimed for scoping have not been realized because after public groups raise numerous minor matters, they cannot focus the EIS on the significant issues. It is true that it is always easier to add issues than it is to subtract them during scoping. And you should realize that trying to eliminate a particular environmental impact or alternative from study may arouse the suspicions of some people. Cooperating agencies may be even more reluctant to eliminate issues in their areas of special expertise than the public participants. But the way to approach it is to seek concensus on which issues are less important. These issues may then be deemphasized in the EIS by a brief discussion of why they were not examined in depth.

If no concensus can be reached, it is still your responsibility to select the significant issues. The lead agency cannot abdicate its role and simply defer to the public. Thus a group of participants at a scoping meeting should not be able to "vote" an insignificant matter into a big issue. If a certain issue is raised and in your professional judgment you believe it is not significant, explain clearly and briefly in the EIS why it is not significant. There is no need to devote time and pages to it in the EIS if you can show that it is not relevant or important to the proposed action. But you should address in some manner all matters that were raised in the scoping process, either by an extended analysis or a brief explanation showing that you acknowledge the concern.

Several agencies have made a practice of sending out a post-scoping document to make public the decisions that have been made on what issues to cover in the EIS. This is not a requirement, but in certain controversial cases it can be worthwhile. Especially when scoping has been conducted by written comments, and there has been no face-to-face contact, a post-scoping document is the only assurance to the participants that they were heard and understood until the draft EIS comes out. Agencies have acknowledged to us that "letters instead of meetings seem to get disregarded easier." Thus a reasonable quid pro quo for relying on comment letters would be to send out a post-scoping document as feedback to the commentors.

The post-scoping document may be as brief as a list of impacts and alternatives selected for analysis; it may consist of the "scope of work" produced by the lead and cooperating agencies for their own EIS work or for the contractor; or it may be a special document that describes all the issues and explains why they were selected.

7. Allocating work assignments and setting schedules.

Following the public participation in whatever form, and the selection of issues to be covered, the lead agency must allocate the EIS preparation work among the available resources. If there are no cooperating agencies, the lead agency allocates work among its own personnel or contractors. If there are cooperating agencies involved, they may be assigned specific research or writing tasks. The NEPA regulations require that they normally devote their own resources to the issues in which they have special expertise or jurisdiction by law. (Sections 1501.6(b)(3), (5), and 1501.7(a)(4)).

In all cases, the lead agency should set a schedule for completion of the work, designate a project manager and assign the reviewers, and must set a time limit for the entire NEPA analysis if requested to do so by an applicant. (Section 1501.8).

8. A few ideas to try.

a. Route design workshop

As part of a scoping process, a successful innovation by one agency involved route selection for a railroad. The agency invited representatives of the interested groups (identified at a previous public meeting) to try their hand at designing alternative routes for a proposed rail segment. Agency staff explained design constraints and evaluation criteria such as the desire to minimize damage to prime agricultural land and valuable wildlife habitat. The participants were divided into small groups for a few hours of intensive work. After learning of the real constraints on alternative routes, the participants had a better understanding of the agency's and applicant's viewpoints. Two of the participants actually supported alternative routes that affected their own land because the overall impacts of these routes appeared less adverse.

The participants were asked to rank the five alternatives they had devised and the top two were included in the EIS. But the agency did not permit the groups to apply the same evaluation criteria to the routes proposed by the applicant or the agency. Thus public confidence in the process was not as high as it could have been, and probably was reduced when the applicant's proposal was ultimately selected.

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The Council recommends that when a hands-on design workshop is used, the assignment of the group be expanded to include evaluation of the reasonableness of all the suggested alternatives.

b. Hotline

Several agencies have successfully used a special telephone number, essentially a hotline, to take public comments before, after, or instead of a public meeting. It helps to designate a named staff member to receive these calls so that some continuity and personal relationships can be developed.

c. Videotape of sites

A videotape of proposed sites is an excellent tool for explaining site differences and limitations during the lecture-format part of a scoping meeting.

d. Videotape meetings

One agency has videotaped whole scoping meetings. Staff found that the participants took their roles more seriously and the taping appeared not to precipitate grandstanding tactics.

e. Review committee

Success has been reported from one agency which sets up review committees, representing all interested groups, to oversee the scoping process. The committees help to design the scoping process. In cooperation with the lead agency, the committee reviews the materials generated by the scoping meeting. Again, however, the final decision on EIS content is the responsibility of the lead agency.

f. Consultant as meeting moderator

In some hotly contested cases, several agencies have used the EIS consultant to actually run the scoping meeting. This is permitted under the NEPA regulations and can be useful to de-fuse a tense atmosphere if the consultant is perceived as a neutral third party. But the responsible agency officials must attend the meetings. There is no substitute for developing a relationship between the agency officials and the affected parties. Moreover, if the responsible officials are not prominently present, the public may interpret that to mean that the consultant is actually making the decisions about the EIS, and not the lead agency.

g. Money saving tips

Remember that money can be saved by using conference calls instead of meetings, tape-recording the meetings instead of hiring a stenographer, and finding out whether people want a meeting before announcing it.

C. Pitfalls.

We list here some of the problems that have been experienced in certain scoping cases, in order to enable others to avoid the same difficulties.

1. Closed meetings.

In response to informal advice from CEQ that holding separate meetings for agencies and the public would be permitted under the regulations and could be more productive, one agency scheduled a scoping meeting for the cooperating agencies some weeks in advance of the public meeting. Apparently, the lead agency felt that the views of the cooperating agencies would be more candidly expressed if the meeting were closed. In any event, several members of the public learned of the meeting and asked to be present. The lead agency acquiesced only after newspaper reporters were able to make a story out of the closed session. At the meeting, the members of the public were informed that they would not be allowed to speak, nor to record the proceedings. The ill feeling aroused by this chain of events may not be repaired for a long time. Instead, we would suggest the following possibilities:

a. Although separate meetings for agencies and public groups may be more efficient, there is no magic to them. By all means, if someone insists on attending the agency meeting, let him. There is nothing as secret going on there as he may think there is if you refuse him admittance. Better yet, have your meeting of cooperating agencies after the public meeting. That may be the most logical time anyway, since only then can the scope of the EIS be decided upon and assignments made among the agencies. If it is well done, the public meeting will satisfy most people and show them that you are listening to them.

b. Always permit recording. In fact, you should suggest it for public meetings. All parties will feel better if there is a record of the proceeding. There is no need for a stenographer, and tape is inexpensive. It may even be better then a typed transcript, because staff and decision-makers who did not attend the meeting can listen to the exchange and may learn a lot about public perceptions of the proposal.

c. When people are admitted to a meeting, it makes no sense to refuse their requests to speak. However, you can legitimately limit their statements to the subject at hand—scoping. You do not have to permit some participants to waste the others' time if they refuse to focus on the impacts and alternatives for inclusion in the EIS. Having a tape of the proceedings could be useful after the meeting if there is some question that speakers were improperly silenced. But it takes an experienced moderator to handle a situation like this.

d. The scoping stage is the time for building confidence and trust on all sides of a proposal, because this is the only time when there is a common enterprise. The attitudes formed at this stage can carry through the project review process. Certainly it is difficult for things to get better. So foster the good will as long as you can by listening to what is being said during scoping. It is possible that out of that dialogue may appear recommendations for changes and mitigation measures that can turn a controversial fight into an acceptable proposal.

2. Contacting interested groups.

Some problems have arisen in scoping where agencies failed to contact all the affected parties, such as industries or state and local governments. In one case, a panel was assembled to represent various interests in scoping an EIS on a wildlife-related program. The agency had an excellent format for the meeting, but the panel did not represent industries that would be affected by the program or interested state and local governments. As a result, the EIS may fail to reflect the issues of concern to these parties.

Another agency reported to us that it failed to contact parties directly because staff feared that if they missed someone they would be accused of favoritism. Thus they relied on the issuance of press releases which were not effective. Many people who did not learn about the meetings in time sought additional meeting opportunities, which cost extra money and delayed the process.

In our experience, the attempt to reach people is worth the effort. Even if you miss someone, it will be clear that you tried. You can enlist a few representatives of an interest group to help you identify and contact others. Trade associations, chambers of commerce, local civic groups, and local and national conservation groups can spread the word to members.

3. Tiering.

Many people are not familiar with the way environmental impact statements can be "tiered" under the NEPA regulations, so that issues are examined in detail at the stage that decisions on them are being made. See Section 1508.28 of the regulations. For example, if a proposed program is under review, it is possible that site specific actions are not yet proposed. In such a case, these actions are not addressed in the EIS on the program, but are reserved for a later tier of analysis. If tiering is being used, this concept must be made clear at the outset of any scoping meeting, so that participants do not concentrate on issues that are not going to be addressed at this time. If you can specify when these other issues will be addressed it will be easier to convince people to focus on the matters at hand.

4. Scoping for unusual programs.

One interesting scoping case involved proposed changes in the Endangered Species Program. Among the impacts to be examined were the effects of this conservation program on user activities such as mining, hunting, and timber harvest, instead of the other way around. Because of this reverse twist in the impacts to be analyzed, some participants had difficulty focusing on useful issues. Apparently, if the subject of the EIS is unusual, it will be even harder than normal for scoping participants to grasp what is expected of them.

In the case of the Endangered Species Program EIS, the agency planned an intensive 3 day scoping session, successfully involved the participants, and reached accord on several issues that would be important for the future implementation of the program. But the participants were unable to focus on impacts and program alternatives for the EIS. We suggest that if the intensive session had been broken up into 2 or 3 meetings separated by days or weeks, the participants might have been able to get used to the new way of thinking required, and thereby to participate more productively. Programmatic proposals are often harder to deal with in a scoping context than site specific projects. Thus extra care should be taken in explaining the goals of the proposal and in making the information available well in advance of any meetings.

D. Lead and Cooperating Agencies.

Some problems with scoping revolve around the relationship between lead and cooperating agencies. Some agencies are still uncomfortable with these roles. The NEPA regulations, and the 40 Questions and Answers about the NEPA Regulations, 46 Fed. Reg. 18026, (March 23, 1981) describe in detail the way agencies are now asked to cooperate on environmental analyses. (See Questions 9, 14, and 30.) We will focus here on the early phase of that cooperation.

It is important for the lead agency to be as specific as possible with the cooperating agencies. Tell them what you want them to contribute during scoping: environmental impacts and alternatives. Some agencies still do not understand the purpose of scoping.

Be sure to contact and involve representatives of the cooperating agencies who are responsible for NEPA-related functions. The lead agency will need to contact staff of the cooperating agencies who can both help to identify issues and alternatives and commit resources to a study, agree to a schedule for EIS preparation, or approve a list of issues as sufficient. In some agencies that will be at the district or state office level (e.g., Corps of Engineers, Bureau of Land Management, and Soil Conservation Service) for all but exceptional cases. In other agencies you must go to regional offices for scoping comments and commitments (e.g., EPA, Fish and Wildlife Service, Water and Power Resources Service). In still others, the field offices do not have NEPA responsibilities or expertise and you will deal directly with headquarters (e.g., Federal Energy Regulatory Commission, Interstate Commerce Commission). In all cases you are looking for the office that can give you the answers you need. So keep trying until you find the organizational level of the cooperating agency that can give you useful information and that has the authority to make commitments.

As stated in 40 Questions and Answers about the NEPA Regulations, the lead agency has the ultimate responsibility for the content of the EIS, but if it leaves out a significant issue or ignores the advice and expertise of the cooperating agency, the EIS may be found later to be inadequate. (46 Fed. Reg. 18030, Question 14b.) At the same time, the cooperating agency will be concerned that the EIS contain material sufficient to satisfy its decisionmaking needs. Thus, both agencies have a stake in producing a document of good quality. The cooperating agencies should be encouraged not only to participate in scoping but also to review the decisions made by the lead agency about what to include in the EIS. Lead agencies should allow any information needed by a cooperating agency to be included, and any issues of concern to the cooperating agency should be covered, but it usually will have to be at the expense of the cooperating agency.

Cooperating agencies have at least as great a need as the general public for advance information on a proposal before any scoping takes place. Agencies have reported to us that information from the lead agency is often too sketchy or comes too late for informed participation. Lead agencies must clearly explain to all cooperating agencies what the proposed action is conceived to be at this time, and what present alternatives and issues the lead agency sees, before expecting other agencies to devote time and money to a scoping session. Informal contacts among the agencies before scoping gets underway are valuable to establish what the cooperating agencies will need for productive scoping to take place.

Some agencies will be called upon to be cooperators more frequently than others, and they may lack the resources to respond to the numerous requests. The NEPA regulations permit agencies without jurisdiction by law (i.e., no approval authority over the proposal) to decline the cooperating agency role. (Section 1501.6(c)). But agencies that do have jurisdiction by law cannot opt out entirely and may have to reduce their cooperating effort devoted to each EIS. (See Section 1501.6(c) and 40 Questions and Answers about the NEPA Regulations, 46 Fed. Reg. 18030, Question 14a.) Thus, cooperators would be greatly aided by a priority list from the lead agency showing which proposals most need their help. This will lead to a more efficient allocation of resources.

Some cooperating agencies are still holding back at the scoping stage in order to retain a critical position for later in the process. They either avoid the scoping sessions or fail to contribute, and then raise objections in comments on the draft EIS. We cannot emphasize enough that the whole point of scoping is to avoid this situation. As we stated in 40 Questions and Answers about the NEPA Regulations, "if the new alternative [or other issue] was not raised by the commentor during scoping, but could have been, commentors may find that they are unpersuasive in their efforts to have their suggested alternative analyzed in detail by the [lead] agency." (46 Fed. Reg. 18035, Question 29b.)

III. Advice for Public Participants

Scoping is a new opportunity for you to enter the earliest phase of the decisionmaking process on proposals that affect you. Through this process you have access to public officials before decisions are made and the right to explain your objections and concerns. But this opportunity carries with it a new responsibility. No longer may individuals hang back until the process is almost complete and then spring forth with a significant issue or alternative that might have been raised earlier. You are now part of the review process, and your role is to inform the responsible agencies of the potential impacts that should be studied, the problems a proposal may cause that you foresee, and the alternatives and mitigating measures that offer promise.

As noted above, and in 40 Questions and Answers, no longer will a comment raised for the first time after the draft EIS is finished be accorded the same serious consideration it would otherwise have merited if the issue had been raised during scoping. Thus you have a responsibility to come forward early with known issues.

In return, you get the chance to meet the responsible officials and to make the case for your alternative before they are committed to a course of action. To a surprising degree this avenue has been found to yield satisfactory results. There's no guarantee, of course, but when the alternative you suggest is really better, it is often hard for a decisionmaker to resist.

There are several problems that commonly arise that public participants should be aware of:

A. Public input is often only negative

The optimal timing of scoping within the NEPA process is difficult to judge. On the one hand, as explained above (Section II.B.1.), if it is attempted too early, the agency cannot explain what it has in mind and informed participation will be impossible. On the other, if it is delayed, the public may find that significant decisions are already made, and their comments may be discounted or will be too late to change the project. Some agencies have found themselves in a tactical cross-fire when public criticism arises before they can even define their proposal sufficiently to see whether they have a worthwhile plan. Understandably, they would be reluctant after such an experience to invite public criticism early in the planning process through open scoping. But it is in your interest to encourage agencies to come out with proposals in the early stage because that enhances the possibility of your comments being used. Thus public participants in scoping should reduce the emotion level wherever possible and use the opportunity to make thoughtful, rational presentations on impacts and alternatives. Polarizing over issues too early hurts all parties. If agencies get positive and useful public responses from the scoping process, they will more frequently come forward with proposals early enough so that they can be materially improved by your suggestions.

B. Issues are too broad

The issues that participants tend to identify during scoping are much too broad to be useful for analytical purposes. For example, "cultural impacts" — what does this mean? What precisely are the impacts that should be examined? When the EIS preparers encounter a comment as vague as this they will have to make their own judgment about what you meant, and you may find that your issues are not covered. Thus, you should refine the broad general topics, and specify which issues need evaluation and analysis.

C. Impacts are not identified

Similarly, people (including agency staff) frequently identify "causes" as issues but fail to identify the principal "effects" that the EIS should evaluate in depth. For example, oil and gas development is a cause of many impacts. Simply listing this generic category is of little help. You must go beyond the obvious causes to the specific effects that are of concern. If you want scoping to be seen as more than just another public meeting, you will need to put in extra work.

IV. Brief Points For Applicants.

Scoping can be an invaluable part of your early project planning. Your main interest is in getting a proposal through the review process. This interest is best advanced by finding out early where the problems with the proposal are, who the affected parties are, and where accomodations can be made. Scoping is an ideal meeting place for all the interest groups if you have not already contacted them. In several cases, we found that the compromises made at this stage allowed a project to move efficiently through the permitting process virtually unopposed.

The NEPA regulations place an affirmative obligation on agencies to "provide for cases where actions are planned by private applicants" so that designated staff are available to consult with the applicants, to advise applicants of information that will be required during review, and to insure that the NEPA process commences at the earliest possible time. (Section 1501.2(d)). This section of the regulations is intended to ensure that environmental factors are considered at an early stage in the applicant's planning process. (See 40 Questions and Answers about the NEPA Regulations, 46 Fed. Reg. 18028, Questions 8 and 9.)

Applicants should take advantage of this requirement in the regulations by approaching the agencies early to consult on alternatives, mitigation requirements, and the agency's information needs. This early contact with the agency can facilitate a prompt initiation of the scoping process in cases where an EIS will be prepared. You will need to furnish sufficient information about your proposal to enable the lead agency to formulate a coherent presentation for cooperating agencies and the public. But don't wait until your choices are all made and the alternatives have been eliminated. (Section 1506.1).

During scoping, be sure to attend any of the public meetings unless the agency is dividing groups by interest affiliation. You will be able to answer any questions about the proposal, and even more important, you will be able to hear the objections raised, and find out what the real concerns of the public are. This is, of course, vital information for future negotiations with the affected parties.

GUIDANCE REGARDING NEPA REGULATIONS

Council on Environmental Quality

48 Fed. Reg. 34263-34268 (July 28, 1983)

34263

COUNCIL ON ENVIRONMENTAL QUALITY

40 CFR Part 1500

Guidance Regarding NEPA Regulations

AGENCY: Council on Environmental Quality, Executive Office of the President.

ACTION: Information Only, Publication of Memorandum to Agencies Containing Guidance on Agency Implementation of NEPA Regulations.

SUMMARY: The Council on Environmental Quality, as part of its oversight of implementation of the National Environmental Policy Act, on August 14, 1981 requested comments from the public on how the various federal agencies are implementing the regulations promulgated by the Council in 1978 (40 CFR 1500 *et seq.*). The Council received 142 comments. Sixty-nine commenters represented business groups; forty represented state and local governments; fifteen represented environmental groups; thirteen represented federal agencies; and, five represented other interest groups or individuals. The Council staff summarized the comments received in a document which was subsequently made available to the public. On July 12, 1982 the Council published notice of the availability of this summary document in the **Federal Register**. The summary document identified a number of areas in which the comments indicate that agencies need to better manage the NEPA process.

On August 12, 1982 the Council held a public meeting to discuss the issue areas identifed in the summary document. At that time representatives of environmental groups, industry groups, other federal agencies and individuals testified. Subsequent to the meeting the Council received several additional comments addressing the problem areas identifed in the summary document.

Based on the public comments received during this process, the Council is issuing the following guidance document to help officials manage the NEPA process in a more efficient fashion.

DATE: July 22, 1983.

FOR FURTHER INFORMATION CONTACT: Dinah Bear, General Counsel, Council on Environmental Quality, 722 Jackson Place, NW., Washington, D.C. 20006. (202) 395-5754.

A. Alan Hill,
Chairman.

Executive Office of the President

Council on Environmental Quality

722 Jackson Place, N.W.

Washington, D.C. 20006

July 22, 1983.

Memorandum

For: Heads of Federal Agencies
From: A. Alan Hill, Chairman
Re: Guidance Regarding NEPA Regulations

The Council on Environmental Quality (CEQ) regulations implementing the National Environmental Policy Act (NEPA) were issued on November 29, 1978. These regulations became effective for, and binding upon, most federal agencies on July 30, 1979, and for all remaining federal agencies on November 30, 1979.

As part of the Council's NEPA oversight responsibilities it solicited through an August 14, 1981, notice in the **Federal Register** public and agency comments regarding a series of questions that were developed to provide information on the manner in which federal agencies were implementing the CEQ regulations. On July 12, 1982, the Council announced the availability of a document summarizing the comments received from the public and other agencies and also identifying issue areas which the Council intended to review. On August 12, 1982, the Council held a public meeting to address those issues and hear any other comments which the public or other interested agencies might have about the NEPA process. The issues addressed in this guidance were identified during this process.

There are many ways in which agencies can meet their responsibilities under NEPA and the 1978 regulations. The purpose of this document is to provide the Council's guidance on various ways to carry out activities under the regulations.

Scoping

The Council on Environmental Quality (CEQ) regulations direct federal agencies which have made a decision to prepare an environmental impact statement to engage in a public scoping process. Public hearings or meetings, although often held, are not required; instead the manner in which public input will be sought is left to the discretion of the agency.

The purpose of this process is to determine the scope of the EIS so that preparation of the document can be effectively managed. Scoping is intended to ensure that problems are identified early and properly studied, that issues of little significance do not consume time and effort, that the draft EIS is thorough and balanced, and that delays occasioned by an inadequate draft EIS are avoided. The scoping process should identify the public and agency concerns; clearly define the environmental issues and alternatives to be examined in the EIS including the elimination of nonsignificant issues; identify related issues which originate from separate legislation, regulation, or Executive Order (e.g. historic preservation or endangered species concerns); and identify state and local agency requirements which must be addressed. An effective scoping process can help reduce unnecessary paperwork and time delays in preparing and processing the EIS by clearly identifying all relevant procedural requirements.

In April 1981, the Council issued a "Memorandum for General Counsels, NEPA Liaisons and Participants in Scoping" on the subject of Scoping Guidance. The purpose of this guidance was to give agencies suggestions as to how to more effectively carry out the CEQ scoping requirement. The availability of this document was announced in the **Federal Register** at 46 FR 25461. It is still available upon request from the CEQ General Counsel's office.

The concept of lead agency (§ 1508.16) and cooperating agency (§ 1508.5) can be used effectively to help manage the scoping process and prepare the environmental impact statement. The lead agency should identify the potential cooperating agencies. It is incumbent upon the lead agency to identify any agency which may ultimately be involved in the proposed action, including any subsequent permitting

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actions. Once cooperating agencies have been identified they have specific responsibility under the NEPA regulations (40 CFR 1501.6). Among other things cooperating agencies have responsibilities to participate in the scoping process and to help identify issues which are germane to any subsequent action it must take on the proposed action. The ultimate goal of this combined agency effort is to produce an EIS which in addition to fulfilling the basic intent of NEPA, also encompasses to the maximum extent possible all the environmental and public involvement requirements of state and federal laws, Executive Orders, and administrative policies of the involved agencies. Examples of these requirements include the Fish and Wildlife Coordination Act, the Clean Air Act, the Endangered Species Act, the National Historic Preservation Act, the Wild and Scenic Rivers Act, the Farmland Protection Policy Act, Executive Order 11990 (Protection of Wetlands), and Executive Order 11998 (Floodplain Management).

It is emphasized that cooperating agencies have the responsibility and obligation under the CEQ regulations to participate in the scoping process. Early involvement leads to early identification of significant issues, better decisionmaking, and avoidance of possible legal challenges. Agencies with "jurisdiction by law" must accept designation as a cooperating agency if requested (40 CFR 1501.6).

One of the functions of scoping is to identify the public involvement/public hearing procedures of all appropriate state and federal agencies that will ultimately act upon the proposed action. To the maximum extent possible, such procedures should be integrated into the EIS process so that joint public meetings and hearings can be conducted. Conducting joint meetings and hearings eliminates duplication and should significantly reduce the time and cost of processing an EIS and any subsequent approvals. The end result will be a more informed public cognizant of all facets of the proposed action.

It is important that the lead agency establish a process to properly manage scoping. In appropriate situations the lead agency should consider designating a project coordinator and forming an interagency project review team. The project coordinator would be the key person in monitoring time schedules and responding to any problems which may arise in both scoping and preparing the EIS. The project review team would be established early in scoping and maintained throughout the process of preparing the EIS. This review team would include state and local agency representatives. The review team would meet periodically to ensure that the EIS is complete, concise, and prepared in a timely manner.

A project review team has been used effectively on many projects. Some of the more important functions this review team can serve include: (1) A source of information, (2) a coordination mechanism, and (3) a professional review group. As an information source, the review team can identify all federal, state, and local environmental requirements, agency public meeting and hearing procedures, concerned citizen groups, data needs and sources of existing information, and the significant issues and reasonable alternatives for detailed analysis, excluding the non-significant issues. As a coordination mechanism, the team can ensure the rapid distribution of appropriate information or environmental studies, and can reduce the time required for formal consultation on a number of issues (e.g., endangered species or historic preservation). As a professional review group the team can assist in establishing and monitoring a tight time schedule for preparing the EIS by identifying critical points in the process, discussing and recommending solutions to the lead agency as problems arise, advising whether a requested analysis or information item is relevant to the issues under consideration, and providing timely and substantive review comments on any preliminary reports or analyses that may be prepared during the process. The presence of professionals from all scientific disciplines which have a significant role in the proposed action could greatly enhance the value of the team.

The Council recognizes that there may be some problems with the review team concept such as limited agency travel funds and the amount of work necessary to coordinate and prepare for the periodic team meetings. However, the potential benefits of the team concept are significant and the Council encourages agencies to consider utilizing interdisciplinary project review teams to aid in EIS preparation. A regularly scheduled meeting time and location should reduce coordination problems. In some instances, meetings can be arranged so that many projects are discussed at each session. The benefits of the concept are obvious: timely and effective preparation of the EIS, early identification and resolution of any problems which may arise, and elimination, or at least reduction of, the need for additional environmental studies subsequent to the approval of the EIS.

Since the key purpose of scoping is to identify the issues and alternatives for consideration, the scoping process should "end" once the issues and alternatives to be addressed in the EIS have been clearly identified. Normally this would occur during the final stages of preparing the draft EIS and before it is officially circulated for public and agency review.

The Council encourages the lead agency to notify the public of the results of the scoping process to ensure that all issues have been identified. The lead agency should document the results of the scoping process in its administrative record.

The NEPA regulations place a new and significant responsibility on agencies and the public alike during the scoping process to identify all significant issues and reasonable alternatives to be addressed in the EIS. Most significantly, the Council has found that scoping is an extremely valuable aid to better decisionmaking. Thorough scoping may also have the effect of reducing the frequency with which proposed actions are challenged in court on the basis of an inadequate EIS. Through the techniques identified in this guidance, the lead agency will be able to document that an open public involvement process was conducted, that all reasonable alternatives were identified, that significant issues were identified and non-significant issues eliminated, and that the environmental public involvement requirements of all agencies were met, to the extent possible, in a single "one-stop" process.

Categorical Exclusions

Section 1507 of the CEQ regulations directs federal agencies when establishing implementing procedures to identify those actions which experience has indicated will not have a significant environmental effect and to categorically exclude them from NEPA review. In our August 1981 request for public comments, we asked the question "Have categorical exclusions been adequately identified and defined?".

The responses the Council received indicated that there was considerable belief that categorical exclusions were not adequately identified and defined. A number of commentators indicated that agencies had not identified all categories of actions that meet the categorical exclusion definition (§ 1508.4) or that agencies were overly restrictive in their interpretations of categorical exclusions. Concerns were expressed that agencies were requiring too much documentation for projects that were not major federal actions with significant effects and also that agency procedures to add categories of actions to their existing lists of categorical exclusions were too cumbersome.

The National Environmental Policy Act and the CEQ regulations are concerned primarily with those "major federal actions signficantly affecting the quality of the human environment" (42 U.S.C. 4332). Accordingly, agency procedures, resources, and efforts should focus on determining whether the proposed federal action is a major federal action significantly affecting the quality of the human environment. If the answer to this question is yes, an environmental impact statement must be prepared. If there is insufficient information to answer the question, an environmental assessment is needed to assist the agency in determining if the environmental impacts are significant and require an EIS. If the assessment shows that the impacts are not significant, the agency must prepare a finding of no significant impact. Further stages of this federal action may be excluded from requirements to prepare NEPA documents.

The CEQ regulations were issued in 1978 and most agency implementing regulations and procedures were issued shortly thereafter. In recognition of the experience with the NEPA process that agencies have had since the CEQ regulations were issued, the Council believes that it is appropriate for agencies to examine their procedures to insure that the NEPA process utilizes this additional knowledge and experience. Accordingly, the Council strongly encourages agencies to re-examine their environmental procedures and specifically those portions of the procedures where "categorical exclusions" are discussed to determine if revisions are appropriate. The specific issues which the Council is concerned about are (1) the use of detailed lists of specific activities for categorical exclusions, (2) the excessive use of environmental assessments/findings of no significant impact and (3) excessive documentation.

The Council has noted some agencies have developed lists of specific activities which qualify as categorical exclusions. The Council believes that if this approach is applied narrowly it will not provide the agency with sufficient flexibility to make decisions on a project-by-project basis with full consideration to the issues and impacts that are unique to a specific project. The Council encourages the agencies to consider broadly defined criteria which characterize types of actions that, based on the agency's experience, do not cause significant environmental effects. If this technique is adopted, it would be helpful for the agency to offer several examples of activities frequently performed by that agency's personnel which would normally fall in these categories. Agencies also need to consider whether the cumulative effects of several small actions would cause sufficient environmental impact to take the actions out of the categorically excluded class.

The Council also encourages agencies to examine the manner in which they use the environmental assessment process in relation to their process for identifying projects that meet the categorical exclusion definition. A report(*1*) to the Council indicated that some agencies have a very high ratio of findings of no significant impact to environmental assessments each year while producing only a handful of EIS's. Agencies should examine their decisionmaking process to ascertain if some of these actions do not, in fact, fall within the categorical exclusion definition, or, conversely, if they deserve full EIS treatment.

As previously noted, the Council received a number of comments that agencies require an excessive amount of environmental documentation for projects that meet the categorical exclusion definition. The Council believes that sufficient information will usually be available during the course of normal project development to determine the need for an EIS and further that the agency's administrative record will clearly document the basis for its decision. Accordingly, the Council strongly discourages procedures that would require the preparation of additional paperwork to document that an activity has been categorically excluded.

Categorical exclusions promulgated by an agency should be reviewed by the Council at the draft stage. After reviewing comments received during the review period and prior to publication in final form, the Council will determine whether the categorical exclusions are consistent with the NEPA regulations.

Adoption Procedures

During the recent effort undertaken by the Council to review the current NEPA regulations, several participants indicated federal agencies were not utilizing the adoption procedures as authorized by the CEQ regulations. The concept of adoption was incorporated into the Council's NEPA Regulations (40 CFR 1506.3) to reduce duplicative EISs prepared by Federal agencies. The experiences gained during the 1970's revealed situations in which two or more agencies had an action relating to the same project; however, the timing of the actions was different. In the early years of NEPA implementation, agencies independently approached their activities and decisions. This procedure lent itself to two or even three EISs on the same project. In response to this situation the CEQ regulations authorized agencies, in certain instances, to adopt environmental impact statements prepared by other agencies.

In general terms, the regulations recognize three possible situations in which adoption is appropriate. One is where the federal agency participated in the process as a cooperating agency. (40 CFR 1506.3(c)). In this case, the cooperating agency may adopt a final EIS and simply issue its record of decision.(*2*) *However*, the cooperating agency must independently review the EIS and determine that its own NEPA procedures have been satisfied.

A second case concerns the federal agency which was not a cooperating agency, but is, nevertheless, undertaking an activity which was the subject of an EIS. (40 CFR 1506.3(b)). This situation would arise because an agency did not anticipate that it would be involved in a project which was the subject of another agency's EIS. In this instance where the proposed action is substantially the same as that action described in the EIS, the agency may adopt the EIS and recirculate (file with EPA and distribute to agencies and the public) it as a final EIS. However, the agency must independently review the EIS to determine that it is current and that its own NEPA procedures have been satisfied. When recirculating the final EIS the agency should provide information which identifies what federal action is involved.

The third situation is one in which the proposed action is not substantially the same as that covered by the EIS. In this case, any agency may adopt an EIS or a portion thereof by circulating the EIS as a draft or as a portion of the agency's draft and preparing a final EIS. (40 CFR 1506.3(a)). Repetitious analysis and time consuming data collection can be easily eliminated utilizing this procedure.

The CEQ regulations specifically address the question of adoption only in terms of preparing EIS's. However, the objectives that underlie this portion of the regulations—i.e., reducing delays and eliminating duplication—apply with equal force to the issue of adopting other environmental documents. Consequently, the Council encourages agencies to put in place a mechanism for adopting environmental assessments prepared by other agencies. Under such procedures the agency could adopt the environmental assessment and prepare a Finding of No Significant Impact based on that assessment. In doing so, the agency should be guided by several principles:

—First, when an agency adopts such an analysis it must independently evaluate the information contained therein and take full responsibility for its scope and content.

—Second, if the proposed action meets the criteria set out in 40 CFR 1501.4(e)(2), a Finding of No Significant Impact would be published for 30 days of public review before a final determination is made by the agency on whether to prepare an environmental impact statement.

Contracting Provisions

Section 1506.5(c) of the NEPA regulations contains the basic rules for agencies which choose to have an environmental impact statement prepared by a contractor. That section requires the lead or cooperating agency to select the contractor, to furnish guidance and to participate in the preparation of the environmental impact statement. The regulation requires contractors who are employed to prepare an environmental impact statement to sign a disclosure statement stating that they have no financial or other interest in the outcome of the project. The responsible federal official must independently evaluate the statement prior to its approval and take responsibility for its scope and contents.

During the recent evaluation of comments regarding agency implementation of the NEPA process, the Council became aware of confusion and criticism about the provisions of Section 1506.5(c). It appears that a great deal of misunderstanding exists regarding the interpretation of the conflict of interest provision. There is also some feeling that the conflict of interest provision should be completely eliminated.*(3)*

Applicability of § 1506.5(c)

This provision is only applicable when a federal lead agency determines that it needs contractor assistance in preparing an EIS. Under such circumstances, the lead agency or a cooperating agency should select the contractor to prepare the EIS.*(4)*

This provision does not apply when the lead agency is preparing the EIS based on information provided by a private applicant. In this situation, the private applicant can obtain its information from any source. Such sources could include a contractor hired by the private applicant to do environmental, engineering, or other studies necessary to provide sufficient information to the lead agency to prepare an EIS. The agency must independently evaluate the information and is responsible for its accuracy.

Conflict of Interest Provisions

The purpose of the disclosure statement requirement is to avoid situations in which the contractor preparing the environmental impact statement has an interest in the outcome of the proposal. Avoidance of this situation should, in the Council's opinion, ensure a better and more defensible statement for the federal agencies. This requirement also serves to assure the public that the analysis in the environmental impact statement has been prepared free of subjective, self-serving research and analysis.

Some persons believe these restrictions are motivated by undue and unwarranted suspicion about the bias of contractors. The Council is aware that many contractors would conduct their studies in a professional and unbiased manner. However, the Council has the responsibility of overseeing the administration of the National Environmental Policy Act in a manner most consistent with the statute's directives and the public's expectations of sound government. The legal responsibilities for carrying out NEPA's objectives rest solely with federal agencies. Thus, if any delegation of work is to occur, it should be arranged to be performed in as objective a manner as possible.

Preparation of environmental impact statements by parties who would suffer financial losses if, for example, a "no action" alternative were selected, could easily lead to a public perception of bias. It is important to maintain the public's faith in the integrity of the EIS process, and avoidance of conflicts in the preparation of environmental impact statements is an important means of achieving this goal.

The Council has discovered that some agencies have been interpreting the conflicts provision in an overly burdensome manner. In some instances, multidisciplinary firms are being excluded from environmental impact statements preparation contracts because of links to a parent company which has design and/or construction capabilities. Some qualified contractors are not bidding on environmental impact statement contracts because of fears that their firm may be excluded from future design or construction contracts. Agencies have also applied the selection and disclosure provisions to project proponents who wish to have their own contractor for providing environmental information. The result of these misunderstandings has been reduced competition in bidding for EIS preparation contracts, unnecessary delays in selecting a contractor and preparing the EIS, and confusion and resentment about the requirement. The Council believes that a better understanding of the scope of § 1506.5(c) by agencies, contractors and project proponents will eliminate these problems.

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Section 1506.5(c) prohibits a person or entity entering into a contract with a federal agency to prepare an EIS when that party has at that time and during the life of the contract pecuniary or other interests in the outcomes of the proposal. Thus, a firm which has an agreement to prepare an EIS for a construction project cannot, at the same time, have an agreement to perform the construction, nor could it be the owner of the construction site. However, if there are no such separate interests or arrangements, and if the contract for EIS preparation does not contain any incentive clauses or guarantees of any future work on the project, it is doubtful that an inherent conflict of interest will exist. Further, § 1506.5(c) does not prevent an applicant from submitting information to an agency. The lead federal agency should evaluate potential conflicts of interest prior to entering into any contract for the preparation of environmental documents.

Selection of Alternatives in Licensing and Permitting Situations

Numerous comments have been received questioning an agency's obligation, under the National Environmental Policy Act, to evaluate alternatives to a proposed action developed by an applicant for a federal permit or license. This concern arises from a belief that projects conceived and developed by private parties should not be questioned or second-guessed by the government. There has been discussion of developing two standards to determining the range of alternatives to be evaluated: The "traditional" standard for projects which are initiated and developed by a Federal agency, and a second standard of evaluating only those alternatives presented by an applicant for a permit or license.

Neither NEPA nor the CEQ regulations make a distinction between actions initiated by a Federal agency and by applicants. Early NEPA case law, while emphasizing the need for a rigorous examination of alternatives, did not specifically address this issue. In 1981, the Council addressed the question in its document, "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations".(*5*) The answer indicated that the emphasis in determining the scope of alternatives should be on what is "reasonable". The Council said that, "Reasonable alternatives include those that are *practical or feasible* from the technical and economic standpoint and using common sense rather than simply *desirable* from the standpoint of the applicant."

Since issuance of that guidance, the Council has continued to receive requests for further clarification of this question. Additional interest has been generated by a recent appellate court decision. *Roosevelt Campobello International Park Commission* v. *E.P.A.*(*6*) dealt with EPA's decision of whether to grant a permit under the National Pollutant Discharge Elimination System to a company proposing a refinery and deep-water terminal in Maine. The court discussed both the criteria used by EPA in its *selecting* of alternative sites to evaluate, and the substantive standard used to *evaluate* the sites. The court determined that EPA's choice of alternative sites was "focused by the primary objectives of the permit applicant . . ." and that EPA had limited its consideration of sites to only those sites which were considered feasible, given the applicant's stated goals. The court found that EPA's criteria for selection of alternative sites was sufficient to meet its NEPA responsibilities.

This decision is in keeping with the concept that an agency's responsibilities to examine alternative sites has always been "bounded by some notion of feasibility" to avoid NEPA from becoming "an exercise in frivolous boilerplate".(*7*) NEPA has never been interpreted to require examination of purely conjectural possibilities whose implementation is deemed remote and speculative. Rather, the agency's duty is to consider "alternatives as they exist and are likely to exist."(*8*) In the *Roosevelt Campobello* case, for example, EPA examined three alternative sites and two alternative modifications of the project at the preferred alternative site. Other factors to be developed during the scoping process—comments received from the public, other government agencies and institutions, and development of the agency's own environmental data—should certainly be incorporated into the decision of which alternatives to seriously evaluate in the EIS. There is, however, no need to disregard the applicant's purposes and needs and the common sense realities of a given situation in the development of alternatives.

Tiering

Tiering of environmental impact statements refers to the process of addressing a broad, general program, policy or proposal in an initial environmental impact statement (EIS), and analyzing a narrower site-specific proposal, related to the initial program, plan or policy in a subsequent EIS. The concept of tiering was promulgated in the 1978 CEQ regulations; the preceding CEQ guidelines had not addressed the concept. The Council's intent in formalizing the tiering concept was to encourage agencies, "to eliminate repetitive discussions and to focus on the actual issues ripe for decisions at each level of environmental review."(*9*)

Despite these intentions, the Council perceives that the concept of tiering has caused a certain amount of confusion and uncertainty among individuals involved in the NEPA process. This confusion is by no means universal; indeed, approximately half of those commenting in response to our question about tiering (*10*) indicated that tiering is effective and should be used more frequently. Approximately one-third of the commentators responded that they had no experience with tiering upon which to base their comments. The remaining commentators were critical of tiering. Some commentators believed that tiering added an additional layer of paperwork to the process and encouraged, rather than discouraged, duplication. Some commentators thought that the inclusion of tiering in the CEQ regulations added an extra legal requirement to the NEPA process. Other commentators said that an initial EIS could be prepared when issues were too broad to analyze properly for any meaningful consideration. Some commentators believed that the concept was simply not applicable to the types of projects with which they worked: others were concerned about the need to supplement a tiered EIS. Finally, some who responded to our inquiry questioned the courts' acceptance of tiered EISs.

The Council believes that misunderstanding of tiering and its place in the NEPA process is the cause of much of this criticism. Tiering, of course, is by no means the best way to handle all proposals which are subject to NEPA analysis and documentation. The regulations do not require tiering; rather, they authorize its use when an agency determines it is appropriate. It is an option for an agency to use when the nature of the proposal lends itself to tiered EIS(s).

Tiering does not add an additional legal requirement to the NEPA process. An environmental impact statement is required for proposals for legislation and other major Federal actions significantly affecting the quality of the human environment. In the context of NEPA, "major Federal actions" include adoption of official policy, formal plans, and programs as well as approval of specific projects, such as construction activities in a particular location or approval of permits to an outside applicant. Thus, where a Federal agency adopts a formal plan which will be executed throughout a particular region, and later proposes a specific activity to implement that plan in the same region, both actions need to be analyzed under NEPA to determine whether they are major actions which will significantly affect the environment. If the answer is yes in both cases, both actions will be subject to the EIS requirement, whether tiering is used or not. The agency then has one of two alternatives: Either preparation of two environmental impact statements, with the second repeating much of the analysis and information found in the first environmental impact statement, or tiering the two documents. If tiering is utilized, the site-specific EIS contains a summary of the issues discussed in the first statement and the agency will incorporate by reference discussions from the first statement. Thus, the second, or site-specific statement, would focus primarily on the issues relevant to the specific proposal, and would not duplicate material found in the first EIS. It is difficult to understand, given this scenario, how tiering can be criticized for adding an unnecessary layer to the NEPA process; rather, it is intended to streamline the existing process.

The Council agrees with commentators who stated that there are stages in the development of a proposal for a program, plan or policy when the issues are too broad to lend themselves to meaningful analysis in the framework of an EIS. The CEQ regulations specifically define a "proposal" as existing at, "that stage in the development of an action when an agency subject to [NEPA] has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing the goal *and the effects can be meaningfully evaluated.*"(*11*) Tiering is not intended to force an agency to prepare an EIS before this stage is reached; rather, it is a technique to be used once meaningful analysis can be performed. An EIS is not required before that stage in the development of a proposal, whether tiering is used or not.

The Council also realizes that tiering is not well suited to all agency programs. Again, this is why tiering has been established as an *option* for the agency to use, as opposed to a requirement.

A supplemental EIS is required when an agency makes substantial changes in the proposed action relevant to environmental concerns, or when there are signifcant new circumstances or information relevant to environmental concerns bearing on the proposed action, and is optional when an agency otherwise determines to supplement an EIS.(*12*) The standard for supplementing an EIS is not changed by the use of tiering; there will no doubt be occasions when a supplement is needed, but the use of tiering should reduce the number of those occasions.

Finally, some commentators raised the question of courts' acceptability of tiering. This concern is understandable, given several cases which have reversed agency decisions in regard to a particular programmatic EIS. However, these decisions have never invalidated the concept of tiering, as stated in the CEQ regulations and discussed above. Indeed, the courts recognized the usefulness of the tiering approach in case law before the promulgation of the tiering regulation. Rather, the problems appear when an agency determines not to prepare a site-specific EIS based on the fact that a programmatic EIS was prepared. In this situation, the courts carefully examine the analysis contained in the programmatic EIS. A court may or may not find that the programmatic EIS contains appropriate analysis of impacts and alternatives to meet the adequacy test for the site-specific proposal. A recent decision by the Ninth Circuit Court of Appeals (*13*) invalidated an attempt by the Forest Service to make a determination regarding wilderness and non-wilderness designations on the basis of a programmatic EIS for this reason. However, it should be stressed that this and other decisions are not a repudiation of the tiering concept. In these instances, in fact, tiering has *not* been used; rather, the agencies have attempted to rely exclusively on programmatic or "first level" EISs which did not have site-specific information. No court has found that the tiering process as provided for in the CEQ regulations is an improper manner of implementing the NEPA process.

In summary, the Council believes that tiering can be a useful method of reducing paperwork and duplication when used carefully for appropriate types of plans, programs and policies which will later be translated into site-specific projects. Tiering should not be viewed as an additional substantive requirement, but rather a means of accomplishing the NEPA requirements in an efficient manner as possible.

Footnotes

(*1*) Environmental Law Institute, *NEPA In Action Environmental Offices in Nineteen Federal Agencies*, A Report To the Council on Environmental Quality, October 1981.

(*2*) Records of decision must be prepared by each agency responsible for making a decision, and cannot be adopted by another agency.

(*3*) The Council also received requests for guidance on effective management of the third-party environmental impact statement approach. However, the Council determined that further study regarding the policies behind this technique is warranted, and plans to undertake that task in the future.

(*4*) There is no bar against the agency considering candidates suggested by the applicant, although the Federal agency must retain its independence. If the applicant is seen as having a major role in the selection of the contractor, contractors may feel the need to please both the agency and the applicant. An applicant's suggestion, if any, to the agency regarding the choice of contractors should be one of many factors involved in the selection process.

(*5*) 46 FR 18026 (1981).

(*6*) 684 F.2d 1041 (1st Cir. 1982).

(*7*) *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 551 (1978).

(*8*) *Monarch Chemical Works, Inc. v. Exon*, 466 F.Supp. 639, 650 (1979), quoting *Carolina Environmental Study Group v. U.S.*, 510 F.2d 796, 801 (1975).

(*9*) Preamble, FR, Vol. 43, No. 230, p. 55984, 11/29/78.

(*10*) "Is tiering being used to minimizes repetition in an environmental assessment and in environmental impact statements?", 46 FR 41131, August 14, 1981.

(*11*) 40 CFR 1508.23 (emphasis added).

(*12*) 40 CFR 1502.9(c).

(*13*) *California v. Block*, 18 ERC 1149 (1982).

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Negotiated Rulemaking Act

Citations:

5 U.S.C. §§581-590;[1] enacted November 29, 1990, by Pub. L. No. 101-648, 104 Stat. 4969.

Lead Agency:

Administrative Conference of the United States, Suite 500, 2120 L Street NW, Washington, DC 20037 (202) 254-7020.

Overview:

The Negotiated Rulemaking Act of 1990 establishes a statutory framework for agency use of negotiated rulemaking to formulate proposed regulations. The Act supplements the rulemaking provisions of the Administrative Procedure Act (see Chapter 1), clarifying the authority of federal agencies to conduct negotiated rulemaking. It largely codifies the practice of those agencies that had previously used the procedure. While not requiring use of the technique, the Act allows each agency discretion about using negotiated rulemaking.

Negotiated rulemaking (sometimes known as "regulatory negotiation" or "reg-neg") has emerged in the 1980s as an alternative to traditional procedures for drafting proposed regulations. The essence of the idea is that in certain situations it is possible to bring together representatives of the agency and the

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[1] The Administrative Dispute Resolution Act (see Chapter 3), Pub. L. No. 101-552, also contains sections in title 5 of the U.S. Code numbered 581-590. H.R. 2549, 102d Congress, 1st session, would remedy this anomaly (see Chapter 3, footnote 1).

various affected interest groups to negotiate the text of a proposed rule. The negotiators try to reach a consensus through a process of evaluating their own priorities and making tradeoffs to achieve an acceptable outcome on the issues of greatest importance to them. If they do achieve a consensus, then the resulting rule is likely to be easier to implement and the likelihood of subsequent litigation is diminished. Even in the absence of consensus on a draft rule, the process may be valuable as a means of better informing the regulatory agency of the issues and the concerns of the affected interests.

Negotiated rulemaking should be viewed as a supplement to the rulemaking provisions of the Administrative Procedure Act. This means that the negotiation sessions generally take place prior to issuance of the notice and the opportunity for the public to comment on a proposed rule that are required by the Act (5 U.S.C. §553). In some instances, negotiations may be appropriate at a later stage of the proceeding and have sometimes been used effectively in drafting the text of a final rule based on comments received.

In 1982 the Administrative Conference of the United States set forth criteria for identifying rulemaking situations for which reg-neg is likely to be successful (Recommendation 82-4, 1 CFR §305.82-4). These criteria were intended to guide agencies in making the key determination whether negotiated rulemaking is appropriate for particular regulatory problems. The Conference also suggested specific procedures to be followed by agencies in applying this approach. Additional refinements, based on a study of initial agency experiences with reg-neg, were recommended in 1985 (Recommendation 85-5, 1 CFR §305.85-5).

Much of the Negotiated Rulemaking Act is permissive, incorporating many of the criteria and procedures suggested in the Conference recommendations. The drafters intended that the Act not impair any rights otherwise retained by agencies or parties, and section 581 expressly provides that the Act is not intended to limit innovation or experimentation with the negotiated rulemaking process. Although the Act plainly permits an agency to publish as its own the consensus proposal adopted by the negotiating committee, nothing in the Act *requires* the agency to publish either a proposed or final rule merely because a negotiating committee proposed it.

Following the recommendations of the Conference, section 583 of the Act lists several criteria to be considered by agencies in determining whether to use negotiated rulemaking in any particular instance. It permits, but does not require, the use of outside impartial persons (referred to as "conveners") to assist the agency in identifying potential participants in the negotiation process. Section 584 requires public notice of planned negotiated rulemaking proceedings in the Federal Register and appropriate trade and specialized publications. Persons or interests believing that they are not adequately represented on the negotiating committee must be given an opportunity to apply for membership, though the agency retains discretion as to whether to grant such requests.

Section 585 makes clear that agencies establishing negotiating committees under the Act are also to comply with the Federal Advisory Committee Act (see Chapter 10). At least one member of the committee must be a representative of the agency. If, after considering the public responses to the published notice of intent to establish a negotiating committee under the Act, the agency determines not to do so, then the agency must publish a notice of that fact and the reasons for the decision.

Section 586 addresses procedures of the negotiating committee and provides for selection of a neutral "facilitator" or mediator to assist the committee in its deliberations.

Section 587 permits an agency to keep a negotiating committee in existence until promulgation of the final rule, but also allows earlier termination if the agency or the committee so chooses.

Options for agencies with respect to acquiring the services of conveners and facilitators are addressed in section 588.[2] Agencies are authorized to pay expenses of certain committee members in accordance with the Federal Advisory Committee Act. Section 589 authorizes the Conference to pay certain expenses at the request of an agency conducting a negotiated rulemaking. (Funding for this purpose is authorized by section 4 of the Act.)

To avoid creating new sources of potential litigation, section 590 provides that agency actions pertaining to *procedural* decisions in negotiated rulemaking are not subject to judicial review. However, otherwise available judicial review of the *rules* promulgated through the negotiation process is not affected by the Act.

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[2] See also Conference Recommendation 86-8, *Acquiring the Services of "Neutrals" for Alternative Means of Dispute Resolution*, 1 CFR §305.86-8; Ruttinger, Acquiring the Services of Neutrals for Alternative Means of Dispute Resolution and Negotiated Rulemaking, 1986 ACUS 863.

Section 5 of the Negotiated Rulemaking Act terminates the provisions of the Act after 6 years (November 29, 1996). Numerous federal agencies conducted negotiated rulemaking proceedings under other authority prior to adoption of the Negotiated Rulemaking Act. Expiration of this Act clearly does not imply that an agency could no longer undertake a negotiated rulemaking.

Legislative History:

Joint hearings on "regulatory negotiation" were held in July 1980 by the Senate's Select Committee on Small Business and Committee on Governmental Affairs. Legislation was introduced in September 1980 "to create a pilot program to encourage . . . the formation of regulatory negotiation commissions, comprised of representatives of business, public interest organizations, labor, State and local officials, and other interested persons, for the purpose of making recommendations to Federal agencies on regulatory policy." (H.R. 8240, 96th Congress) Other bills to establish a statutory framework for negotiated rulemaking were introduced in each subsequent Congress throughout the 1980s.

The first negotiated rulemaking bill to be acted upon was S. 1504, introduced by Senator Carl Levin in the 100th Congress. The Senate Committee on Governmental Affairs held hearings on May 13, 1988, and the Senate passed the bill on September 30, 1988 (134 Cong. Rec. S 13760, September 30, 1988; see also the report of the Senate Committee on Governmental Affairs, 100th Congress, 2d Session, S. Rep. No. 100-547). In the House, the Judiciary Subcommittee on Administrative Law and Governmental Relations held a hearing on August 10, 1988, on a companion bill, H.R. 3052, introduced by Representative Donald Pease. No further action was taken.

In the 101st Congress, identical bills, S. 303 and H.R. 743, were introduced on January 31, 1989 (135 Cong. Rec. S 862 and H 144, January 31, 1989). The Senate Committee on Governmental Affairs reported out S. 303 on July 13, 1989, and the Senate passed it on August 3, 1989 (see 135 Cong. Rec. S 10060, August 3, 1989; see also the report of the Senate Committee on Governmental Affairs, 101st Congress, 1st Session, S. Rep. No. 101-97).

The House Subcommittee held a hearing on H.R. 743 on May 3, 1989, and on February 7, 1990, reported out the bill with amendments. The Committee on the Judiciary passed the bill on March 28, and the House passed it on May 1 (136 Cong. Rec. H 1852, May 1, 1990; see also the report of the House Committee on the Judiciary, 101st Congress, 2d Session, H. Rep. No. 101-461). The Senate amended the bill further and passed S. 303 again on October 4 (136 Cong. Rec. S 14580, October 4, 1990). The House accepted the Senate amendments, voting final passage on October 22 (136 Cong. Rec. H 10966, October 22, 1990). The bill was signed by President Bush on November 29, 1990.

During the period of congressional consideration of the Negotiated Rulemaking Act, Congress passed three other pieces of legislation that mandated use of negotiated rulemaking: the Carl D. Perkins Vocational and Applied Technology Education Act Amendments (Pub. L. No. 101-392), the Hawkins-Stafford Elementary and Secondary School Improvements Amendments (Pub. L. No. 100-297), and the Price-Anderson Amendments Act of 1988 (Pub. L. No. 100-408). Each of these laws provided specific and widely differing procedures for negotiating rules. In the future, the Negotiated Rulemaking Act may serve as a common reference whenever Congress wants to use reg-neg in other legislation, replacing this ad hoc approach.

Significant Case Law:

EPA's final rule on asbestos-containing materials in schools was the first reg-neg rule to be challenged in court. The suit was brought by the Safe Buildings Alliance, a group representing former manufacturers of asbestos building products that are now illegal. Plaintiffs in the lawsuit claimed that the rule would encourage unnecessary removal of materials from buildings and would result in a chaotic situation. They sought a more objective standard--based on air monitoring, for example--rather than the professional judgment called for under EPA's rule. The Safe Buildings Alliance had been represented on the negotiating committee. Several other parties who were represented on the negotiating committee intervened *in support of the final rule* as published. These included the National Education Association, the American Association of School Administrators, and a group of state attorneys general.

In May 1988, the rule was upheld by the U.S. Court of Appeals for the D.C. Circuit, *Safe Buildings Alliance v. EPA*, 846 F.2d 79 (D.C. Cir. 1988). The court determined that EPA's regulation embodied a reasonable interpretation of the requirements of the Asbestos Hazard Emergency Response Act of 1986, Pub. L. No. 99-519, 15 U.S.C. §§2641-54. Neither the appeal nor the court's decision referred to the negotiation procedure that was followed. EPA's underground injection rule, based in part on negotiated rulemaking, was also challenged and essentially upheld by the D.C. Circuit, *Natural Resources Defense Council v. EPA*, 907 F.2d 1146 (D.C. Cir. 1990).

Source Note:

In 1990 the Administrative Conference of the United States published the *Negotiated Rulemaking Sourcebook*, a step-by-step guide to the conduct of negotiated rulemaking proceedings. The volume contains a discussion of when and how to use the procedure, along with sample notices and other documents that may be needed by an agency using the process. Numerous articles, both analytical and practical, are reprinted in the *Sourcebook*, including the Harter and Perritt reports to the Conference that furnished the research background for Conference Recommendations 82-4 and 85-5. An extensive bibliography is also included.

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7. *President's Statement on Signing the Negotiated Rulemaking Act of 1990*, 26 Weekly Comp. Pres. Doc. 1945 (Nov. 29, 1990).

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7. Henry H. Perritt, Jr., *Use of Negotiated Rulemaking to Develop a Proposed OSHA Health Standard for MDA* (Report prepared for the Deputy Assistant Secretary of Labor, May 1988).

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2. Owen Olpin et al., *Applying Alternative Dispute Resolution to Rulemaking* (Administrative Conference Colloquium Proceedings), 1 Admin. L.J. 575 (1987).

3. Henry H. Perritt, Jr., *Administrative ADR: Development of Negotiated Rulemaking and Other Processes*, 14 Pepperdine L. Rev. 863 (1987).

4. David M. Pritzker, *Working Together for Better Regulations*, 5 Nat. Resources & Env't 29 (Fall 1990).

5. Lawrence Susskind & Gerard McMahon, *The Theory and Practice of Negotiated Rulemaking*, 3 Yale J. Reg. 133 (1985).

6. Lee M. Thomas, *The Successful Use of Regulatory Negotiation by EPA*, 13 Admin. L. News 1 (ABA Section of Admin. Law, Fall 1987).

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Appendix:

1. Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, 104 Stat. 4969 (including 5 U.S.C. §§581-590); enacted November 29, 1990.

2. Administrative Conference of the U.S., *Negotiated Rulemaking Sourcebook* (David M. Pritzker & Deborah S. Dalton, eds.) (1990), Table of Contents.

Negotiated Rulemaking Act

Title 5, U.S. Code

Subchapter IV–Negotiated Rulemaking Procedure

§581. Purpose.
§582. Definitions.
§583. Determination of need for negotiated rulemaking committee.
§584. Publication of notice; applications for membership on committees.
§585. Establishment of committee.
§586. Conduct of committee activity.
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§588. Services, facilities, and payment of committee member expenses.
§589. Role of the Administrative Conference of the United States and other entities.
§590. Judicial review.

Subchapter IV–Negotiated Rulemaking Procedure[1]

REPEAL OF SUBCHAPTER

Subchapter repealed effective six years after Nov. 29, 1990, see section 5 of Pub. L. No. 101-648, set out as an Effective Date of Repeal; Savings Provision note under section 581 of this subchapter.

§581. Purpose

The purpose of this subchapter is to establish a framework for the conduct of negotiated rulemaking, consistent with section 553 of this title, to encourage agencies to use the process when it enhances the informal rulemaking process. Nothing in this subchapter should be construed as an attempt to limit innovation and experimentation with the negotiated rulemaking process or with other innovative rulemaking procedures otherwise authorized by law.
(Added Pub. L. No. 101-648, §3(a), Nov. 29, 1990, 104 Stat. 4970.)

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[1] Another subchapter IV (§§581-593) is set out preceding this subchapter.

Effective Date of Repeal; Savings Provision

Section 5 of Pub. L. No. 101-648 provided that: "Subchapter IV of title 5, United States Code, as added by section 3 of this Act, and that portion of the table of sections at the beginning of chapter 5 of title 5, United States Code, relating to subchapter IV, are repealed, effective 6 years after the date of the enactment of this Act [Nov. 29, 1990], except that the provisions of such subchapter shall continue to apply after the date of the repeal with respect to then pending negotiated rulemaking proceedings initiated before the date of repeal which, in the judgment of the agencies which are convening or have convened such proceedings, require such continuation, until such negotiated rulemaking proceedings terminate pursuant to such subchapter."

Congressional Findings

Section 2 of Pub. L. No. 101-648 provided that: "The Congress makes the following findings:

"(1) Government regulation has increased substantially since the enactment of the Administrative Procedure Act [see Short Title note set out preceding section 551 of this title].

"(2) Agencies currently use rulemaking procedures that may discourage the affected parties from meeting and communicating with each other, and may cause parties with different interests to assume conflicting and antagonistic positions and to engage in expensive and time-consuming litigation over agency rules.

"(3) Adversarial rulemaking deprives the affected parties and the public of the benefits of face-to-face negotiations and cooperation in developing and reaching agreement on a rule. It also deprives them of the benefits of shared information, knowledge, expertise, and technical abilities possessed by the affected parties.

"(4) Negotiated rulemaking, in which the parties who will be significantly affected by a rule participate in the development of the rule, can provide significant advantages over adversarial rulemaking.

"(5) Negotiated rulemaking can increase the acceptability and improve the substance of rules, making it less likely that the affected parties will resist enforcement or challenge such rules in court. It may also shorten the amount of time needed to issue final rules.

"(6) Agencies have the authority to establish negotiated rulemaking committees under the laws establishing such agencies and their activities and under the Federal Advisory Committee Act (5 U.S.C. App.). Several agencies have successfully used negotiated rulemaking. The process has not been widely used by other agencies, however, in part because such agencies are unfamiliar with the process or uncertain as to the authority for such rulemaking."

Authorization of Appropriations

Section 4 of Pub. L. No. 101-648 provided that: "In order to carry out this Act [see Short Title note above] and the amendments made by this Act, there are authorized to be appropriated to the Administrative Conference of the United States, in addition to amounts authorized by section 576 of title 5, United States Code, not in excess of $500,000 for each of the fiscal years 1991, 1992, and 1993."

§582. Definitions

For the purposes of this subchapter, the term--

(1) "agency" has the same meaning as in section 551(1) of this title;

(2) "consensus" means unanimous concurrence among the interests represented on a negotiated rulemaking committee established under this subchapter, unless such committee

(A) agrees to define such term to mean a general but not unanimous concurrence; or

(B) agrees upon another specified definition;

(3) "convener" means a person who impartially assists an agency in determining whether establishment of a negotiated rulemaking committee is feasible and appropriate in a particular rulemaking;

(4) "facilitator" means a person who impartially aids in the discussions and negotiations among the members of a negotiated rulemaking committee to develop a proposed rule;

(5) "interest" means, with respect to an issue or matter, multiple parties which have a similar point of view or which are likely to be affected in a similar manner;

(6) "negotiated rulemaking" means rulemaking through the use of a negotiated rulemaking committee;

(7) "negotiated rulemaking committee" or "committee" means an advisory committee established by an agency in accordance with this subchapter and the Federal Advisory Committee Act to consider and discuss issues for the purpose of reaching a consensus in the development of a proposed rule;

(8) "party" has the same meaning as in section 551(3) of this title;

(9) "person" has the same meaning as in section 551(2) of this title;

(10) "rule" has the same meaning as in section 551(4) of this title; and

(11) "rulemaking" means "rule making" as that term is defined in section 551(5) of this title.

(Added Pub. L. No. 101-648, §3(a), Nov. 29, 1990, 104 Stat. 4970.)

§583. Determination of need for negotiated rulemaking committee

(a) Determination of Need by the Agency. An agency may establish a negotiated rulemaking committee to negotiate and develop a proposed rule, if the head of the agency determines that the use of the negotiated rulemaking procedure is in the public interest. In making such a determination, the head of the agency shall consider whether--

(1) there is a need for a rule;

(2) there are a limited number of identifiable interests that will be significantly affected by the rule;

(3) there is a reasonable likelihood that a committee can be convened with a balanced representation of persons who

(A) can adequately represent the interests identified under paragraph (2); and

(B) are willing to negotiate in good faith to reach a consensus on the proposed rule;

(4) there is a reasonable likelihood that a committee will reach a consensus on the proposed rule within a fixed period of time;

(5) the negotiated rulemaking procedure will not unreasonably delay the notice of proposed rulemaking and the issuance of the final rule;

(6) the agency has adequate resources and is willing to commit such resources, including technical assistance, to the committee; and

(7) the agency, to the maximum extent possible consistent with the legal obligations of the agency, will use the consensus of the committee with respect to the proposed rule as the basis for the rule proposed by the agency for notice and comment.

(b) Use of Conveners.

(1) Purposes of conveners. An agency may use the services of a convener to assist the agency in

(A) identifying persons who will be significantly affected by a proposed rule, including residents of rural areas; and

(B) conducting discussions with such persons to identify the issues of concern to such persons, and to ascertain whether the establishment of a negotiated rulemaking committee is feasible and appropriate in the particular rulemaking.

(2) Duties of conveners. The convener shall report findings and may make recommendations to the agency. Upon request of the agency, the convener shall ascertain the names of persons who are willing and qualified to represent interests that will be significantly affected by the proposed rule, including residents of rural areas. The report and any recommendations of the convener shall be made available to the public upon request.

(Added Pub. L. No. 101-648, §3(a), Nov. 29, 1990, 104 Stat. 4970.)

§584. Publication of notice; applications for membership on committees

(a) Publication of Notice. If, after considering the report of a convener or conducting its own assessment, an agency decides to establish a negotiated rulemaking committee, the agency shall publish in the Federal Register and, as appropriate, in trade or other specialized publications, a notice which shall include--

(1) an announcement that the agency intends to establish a negotiated rulemaking committee to negotiate and develop a proposed rule;

(2) a description of the subject and scope of the rule to be developed, and the issues to be considered;

(3) a list of the interests which are likely to be significantly affected by the rule;

(4) a list of the persons proposed to represent such interests and the person or persons proposed to represent the agency;

(5) a proposed agenda and schedule for completing the work of the committee, including a target date for publication by the agency of a proposed rule for notice and comment;

(6) a description of administrative support for the committee to be provided by the agency, including technical assistance;

(7) a solicitation for comments on the proposal to establish the committee, and the proposed membership of the negotiated rulemaking committee; and

(8) an explanation of how a person may apply or nominate another person for membership on the committee, as provided under subsection (b).

(b) Applications for Membership or[2] Committee. Persons who will be significantly affected by a proposed rule and who believe that their interests will not be adequately represented by any person specified in a notice under subsection (a)(4) may apply for, or nominate another person for, membership on the negotiated rulemaking committee to represent such interests with respect to the proposed rule. Each application or nomination shall include--

(1) the name of the applicant or nominee and a description of the interests such person shall represent;

(2) evidence that the applicant or nominee is authorized to represent parties related to the interests the person proposes to represent;

(3) a written commitment that the applicant or nominee shall actively participate in good faith in the development of the rule under consideration; and

(4) the reasons that the persons specified in the notice under subsection (a)(4) do not adequately represent the interests of the person submitting the application or nomination.

(c) Period for Submission of Comments and Applications. The agency shall provide for a period of at least 30 calendar days for the submission of comments and applications under this section.

(Added Pub. L. No. 101-648, §3(a), Nov. 29, 1990, 104 Stat. 4971.)

§585. Establishment of committee

(a) Establishment.

(1) Determination to establish committee. If after considering comments and applications submitted under section 584, the agency determines that a negotiated rulemaking committee can adequately represent the interests that will be significantly affected by a proposed rule and that it is feasible and appropriate in the particular rulemaking, the agency may establish a negotiated rulemaking committee. In establishing and administering such a committee, the agency shall comply with the Federal Advisory Committee Act with respect to such committee, except as otherwise provided in this subchapter.

(2) Determination not to establish committee. If after considering such comments and applications, the agency decides not to establish a negotiated rulemaking committee, the agency shall promptly publish notice of such decision and the reasons therefor in the Federal Register and, as appropriate, in trade or other specialized publications, a copy of which shall be sent to any person who applied for, or nominated another person for membership on the negotiating[3] rulemaking committee to represent such interests with respect to the proposed rule.

(b) Membership. The agency shall limit membership on a negotiated rulemaking committee to 25 members, unless the agency head determines that a greater number of members is necessary for the functioning of the committee or to achieve balanced membership. Each committee shall include at least one person representing the agency.

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[2] So in original. Probably should be "on".

[3] So in original. Probably should be "negotiated".

(c) Administrative Support. The agency shall provide appropriate administrative support to the negotiated rulemaking committee, including technical assistance.
(Added Pub. L. No. 101-648, §3(a), Nov. 29, 1990, 104 Stat. 4972.)

§586. Conduct of committee activity

(a) Duties of Committee. Each negotiated rulemaking committee established under this subchapter shall consider the matter proposed by the agency for consideration and shall attempt to reach a consensus concerning a proposed rule with respect to such matter and any other matter the committee determines is relevant to the proposed rule.

(b) Representatives of Agency on Committee. The person or persons representing the agency on a negotiated rulemaking committee shall participate in the deliberations and activities of the committee with the same rights and responsibilities as other members of the committee, and shall be authorized to fully represent the agency in the discussions and negotiations of the committee.

(c) Selecting Facilitator. Notwithstanding section 10(e) of the Federal Advisory Committee Act, an agency may nominate either a person from the Federal Government or a person from outside the Federal Government to serve as a facilitator for the negotiations of the committee, subject to the approval of the committee by consensus. If the committee does not approve the nominee of the agency for facilitator, the agency shall submit a substitute nomination. If a committee does not approve any nominee of the agency for facilitator, the committee shall select by consensus a person to serve as facilitator. A person designated to represent the agency in substantive issues may not serve as facilitator or otherwise chair the committee.

(d) Duties of Facilitator. A facilitator approved or selected by a negotiated rulemaking committee shall--

(1) chair the meetings of the committee in an impartial manner;

(2) impartially assist the members of the committee in conducting discussions and negotiations; and

(3) manage the keeping of minutes and records as required under section 10(b) and (c) of the Federal Advisory Committee Act, except that any personal notes and materials of the facilitator or of the members of a committee shall not be subject to section 552 of this title.

(e) Committee Procedures. A negotiated rulemaking committee established under this subchapter may adopt procedures for the operation of the committee. No provision of section 553 of this title shall apply to the procedures of a negotiated rulemaking committee.

(f) Report of Committee. If a committee reaches a consensus on a proposed rule, at the conclusion of negotiations the committee shall transmit to the agency that established the committee a report containing the proposed rule. If the committee does not reach a consensus on a proposed rule, the committee may transmit to the agency a report specifying any areas in which the committee reached a consensus. The committee may include in a report any other information, recommendations, or materials that the committee considers appropriate. Any committee member may include as an addendum to the report additional information, recommendations, or materials.

(g) Records of Committee. In addition to the report required by subsection (f), a committee shall submit to the agency the records required under section 10(b) and (c) of the Federal Advisory Committee Act.
(Added Pub. L. No. 101-648, §3(a), Nov. 29, 1990, 104 Stat. 4973.)

§587. Termination of committee

A negotiated rulemaking committee shall terminate upon promulgation of the final rule under consideration, unless the committee's charter contains an earlier termination date or the agency, after consulting the committee, or the committee itself specifies an earlier termination date.
(Added Pub. L. No. 101-648, §3(a), Nov. 29, 1990, 104 Stat. 4974.)

§588. Services, facilities, and payment of committee member expenses

(a) Services of Conveners and Facilitators.

(1) In general. An agency may employ or enter into contracts for the services of an individual or organization to serve as a convener or facilitator for a negotiated rulemaking committee under this subchapter, or may use the services of a Government employee to act as a convener or a facilitator for such a committee.

(2) Determination of conflicting interests. An agency shall determine whether a person under consideration to serve as convener or facilitator of a committee under paragraph (1) has any financial or other interest that would preclude such person from serving in an impartial and independent manner.

(b) Services and Facilities of Other Entities. For purposes of this subchapter, an agency may use the services and facilities of other Federal agencies and public and private agencies and instrumentalities with the consent of such agencies and instrumentalities, and with or without reimbursement to such agencies and instrumentalities, and may accept voluntary and uncompensated services without regard to the provisions of section 1342 of title 31. The Federal Mediation and Conciliation Service may provide servicesand facilities, with or without reimbursement, to assist agencies under this subchapter, including furnishing conveners, facilitators, and training in negotiated rulemaking.

(c) Expenses of Committee Members. Members of a negotiated rulemaking committee shall be responsible for their own expenses of participation in such committee, except that an agency may, in accordance with section 7(d) of the Federal Advisory Committee Act, pay for a member's reasonable travel and per diem expenses, expenses to obtain technical assistance, and a reasonable rate of compensation, if--

(1) such member certifies a lack of adequate financial resources to participate in the committee; and

(2) the agency determines that such member's participation in the committee is necessary to assure an adequate representation of the member's interest.

(d) Status of Member as Federal Employee. A member's receipt of funds under this section or section 589 shall not conclusively determine for purposes of sections 202 through 209 of title 18 whether that member is an employee of the United States Government.
(Added Pub. L. No. 101-648, §3(a), Nov. 29, 1990, 104 Stat. 4974.)

§589. Role of the Administrative Conference of the United States and other entities

(a) Consultation by Agencies. An agency may consult with the Administrative Conference of the United States or other public or private individuals or organizations for information and assistance in forming a negotiated rulemaking committee and conducting negotiations on a proposed rule.

(b) Roster of Potential Conveners and Facilitators. The Administrative Conference of the United States, in consultation with the Federal Mediation and Conciliation Service, shall maintain a roster of individuals who have acted as or are interested in serving as conveners or facilitators in negotiated rulemaking proceedings. The roster shall include individuals from government agencies and private groups, and shall be made available upon request. Agencies may also use rosters maintained by other public or private individuals or organizations.

(c) Procedures To Obtain Conveners and Facilitators.

(1) Procedures. The Administrative Conference of the United States shall develop procedures which permit agencies to obtain the services of conveners and facilitators on an expedited basis.

(2) Payment for services. Payment for the services of conveners or facilitators shall be made by the agency using the services, unless the Chairman of the Administrative Conference agrees to pay for such services under subsection (f).

(d) Compilation of Data on Negotiated Rulemaking; Report to Congress.

(1) Compilation of data. The Administrative Conference of the United States shall compile and maintain data related to negotiated rulemaking and shall act as a clearinghouse to assist agencies and parties participating in negotiated rulemaking proceedings.

(2) Submission of information by agencies. Each agency engaged in negotiated rulemaking shall provide to the Administrative Conference of the United States a copy of any reports submitted to the agency by negotiated rulemaking committees under section 586 and such additional information as necessary to enable the Administrative Conference of the United States to comply with this subsection.

(3) Reports to congress. The Administrative Conference of the United States shall review and analyze the reports and information received under this subsection and shall transmit a biennial report to the Committee on Governmental Affairs of the Senate and the appropriate committees of the House of Representatives that--

(A) provides recommendations for effective use by agencies of negotiated rulemaking; and

(B) describes the nature and amounts of expenditures made by the Administrative Conference of the United States to accomplish the purposes of this subchapter.

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(e) Training in Negotiated Rulemaking. The Administrative Conference of the United States is authorized to provide training in negotiated rulemaking techniques and procedures for personnel of the Federal Government either on a reimbursable or nonreimbursable basis. Such training may be extended to private individuals on a reimbursable basis.

(f) Payment of Expenses of Agencies. The Chairman of the Administrative Conference of the United States is authorized to pay, upon request of an agency, all or part of the expenses of establishing a negotiated rulemaking committee and conducting a negotiated rulemaking. Such expenses may include, but are not limited to--

(1) the costs of conveners and facilitators;

(2) the expenses of committee members determined by the agency to be eligible for assistance under section 588(c); and

(3) training costs.

Determinations with respect to payments under this section shall be at the discretion of such Chairman in furthering the use by Federal agencies of negotiated rulemaking.

(g) Use of Funds of the Conference. The Administrative Conference of the United States may apply funds received under section 575(c)(12) of this title to carry out the purposes of this subchapter.

(Added Pub. L. No. 101-648, §3(a), Nov. 29, 1990, 104 Stat. 4975.)

§590. Judicial review

Any agency action relating to establishing, assisting, or terminating a negotiated rulemaking committee under this subchapter shall not be subject to judicial review. Nothing in this section shall bar judicial review of a rule if such judicial review is otherwise provided by law. A rule which is the product of negotiated rulemaking and is subject to judicial review shall not be accorded any greater deference by a court than a rule which is the product of other rulemaking procedures.

(Added Pub. L. No. 101-648, §3(a), Nov. 29, 1990, 104 Stat. 4976.)

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Paperwork Reduction Act

Citations:

44 U.S.C. §§3501-3520 (1990); enacted December 11, 1980 by Pub. L. No. 96-511, 94 Stat. 2812, amended October 1986 by Pub. L. No. 99-591, title I, §101(m), 100 Stat. 3341-335.

Lead Agency:

Office of Management and Budget, Office of Information and Regulatory Affairs, Old Executive Office Building, 17th Street and Pennsylvania Avenue NW, Washington, DC 20503 (202) 395-4852.

Overview:

The Paperwork Reduction Act of 1980 has as its main purposes to "minimize federal paperwork burden for individuals, small business and State and local government, . . . to minimize the cost of information collection to the Federal Government, . . . and to maximize the usefulness" to the federal government of the information collected. 44 U.S.C. §3501. The Act statutorily established the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB), and assigned it responsibility for coordinating government information policies, including approving agency collections of information. The Act applies to all agencies in the executive branch, as well as to the independent regulatory agencies. Only very narrow functions are exempted from its coverage: (1) federal criminal matters or actions; (2) civil and administrative actions, and investigations of specified individuals or entities; (3) compulsory process issued in connection with antitrust proceedings; and (4) federal intelligence activities carried out under presidential executive order.

Basic Clearance Requirement. The Act assigns to OIRA the function of approving information collections. The Act provides that agencies "shall not conduct or sponsor the collection of information" without first obtaining the approval of the OMB director or his designee. §3507(a). The Act (§3502(4)) defines "collection of information" as:

> "the obtaining or soliciting of facts or opinions by an agency through the use of written report forms, application forms, schedules, questionnaires, reporting or recordkeeping requirements, or other similar methods calling for either-
>
> "(A) answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons, other than agencies, instrumentalities, or employees of the United States; or
>
> "(B) answers to questions posed to agencies, instrumentalities, or employees of the United States which are used for general statistical purposes."

OMB has promulgated regulations that further define "collection of information" by broadly interpreting the term "similar methods." The Act does not cover agency rules mandating disclosure by regulated entities to third parties, however, where the information is not provided either directly or indirectly to an agency. *Dole v. United Steelworkers of America*, 110 S. Ct. 929, 938 (1990).

The Act forbids OMB to approve any information collection for a period of more than 3 years at a time. §3507(d). Failure to obtain OMB approval of a collection of information triggers operation of the Act's public protection provision, §3512, which provides that "no person shall be subject to any penalty for failing to maintain or provide information to any agency if the information collection request . . . does not display a current control number assigned by the Director [of OMB], or fails to state that such a request is not subject to [the requirements of the Paperwork Reduction Act]."

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Clearance Procedure. The Act provides a general set of clearance procedures for approving agency information collections, with more specific procedures prescribed for information collections imposed through notice-and-comment rulemakings.

Section 3504(h) of the Act prescribes the following procedure for information collections contained in rules promulgated following notice and comment:

- No later than publication of the notice of proposed rulemaking (NPRM), the agency must submit the rule to OMB along with any background information OMB needs to conduct its review.
- OMB has 60 days after publication of the NPRM to file comments on the collection of information; if it does not file comments, OMB forfeits its right to disapprove of the information collection.
- When publishing its final rule, the agency must explain how its rule responds to OMB's comments, or why it rejected the comments.
- OMB has 60 days from publication of the final rule to disapprove the collection of information. Disapproval may be because (1) the agency failed to comply with the submission requirements; (2) the agency substantially modified the collection of information in the final rule without giving OMB 60 days to review the modified requirement; or (3) the agency's response to OMB's comments is found to be "unreasonable."
- OMB's decision to disapprove the collection of information in the rule, and its reasons for that decision, must be made publicly available.

OMB's regulations implementing the Act have added certain requirements to the clearance process for collections of information contained in agency rules. OMB requires, among other things, that:

- The public always be given a chance to comment on proposed collections of information. In rulemakings, this is accomplished by including in the NPRM a reference to the fact that the rule has been submitted to OMB for review and that comments may be sent to the OMB desk officer for the agency. 5 CFR §1320.13(a). The rules also require that the agency include in the preamble to the NPRM a brief statement of the need for the collection of information, a description of the likely respondents, and an estimate of the total annual reporting and recordkeeping burden that will result from each collection of information. §1320.15(a).

- OMB comments on the collection of information be placed in the agency's rulemaking record. §1320.13(c).

- All collections of information provisions in rules display an OMB control number, which OMB may assign when it approves the provision even if this occurs prior to publication of the final rule. §1320.13(f).

For information collections that are not contained in new rules promulgated after notice and comment, there is a different process:

- On or before the day an information collection proposal is submitted to OMB for clearance, the agency must send a notice to the Federal Register, in which the agency advises the public that OMB approval has been requested and that the public may submit comments on the proposal to the OMB desk officer for the agency. The notice must include a brief description of the information to be collected, the likely respondents, and an estimate of the total annual recordkeeping burden. 5 CFR §§1320.12(a), 1320.14(b), 1320.15(a).

- Within 60 days after receipt of the agency's submission, OMB will notify the agency of its decision to approve or disapprove, in whole or in part, the information collection. OMB may extend the review period for another 30 days. §1320.12(b).

- If OMB does not act within the 60- or 90-day period, the agency can ask OMB to assign the required control number, and OMB must do so without delay. §1320.12(c).

OMB has also developed procedures that govern clearance for information collections in existing rules. §1320.14. The procedures are intended to prevent expiration of OMB approval for an information collection before the agency has undertaken the necessary administrative procedure to extend OMB's 3-year approval or effect a repeal or amendment of the rule containing the collection provision. The agency is required to initiate the OMB review process not later that 90 days before the existing OMB approval expires, and if OMB indicates disapproval of the existing information collection provision, the agency must initiate rulemaking to amend or rescind the provision, consistent with the APA or other applicable requirements.

Alternative Procedures. The Act contains several variations from the general review procedures for review of agency information collections. It establishes a "fast track" review procedure for emergency situations, which is available on request by agency heads if the stringent tests of section 3507(g) are met. However, OMB by regulation has provided that agencies may request "expedited" processing of collections of information even though the request does not qualify for emergency processing under the statute. 5 CFR §1320.18.

The Act also authorizes the OMB director, following notice and comment, to delegate his approval authority to an agency senior official who "is sufficiently independent of program responsibility to evaluate fairly whether proposed information collection requests should be approved and has sufficient resources to carry out this responsibility effectively." Such an official must comply with OMB's regulations in reviewing his or her agency's information collection provisions. 5 CFR §1320.9.

OMB's general clearance procedures are subject to the Act's provision that independent regulatory agencies may, by majority vote, override an OMB decision disapproving a proposed information collection.

Substantive Standard of Review. The substantive standard governing OMB review of agency information collections is "whether the collection of information by an agency is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility for the agency." 44 U.S.C. §3504(c). OMB's regulations further describe the standard: an agency must show that all reasonable steps have been taken to ensure that the collection of information is the least burdensome necessary, that it is not duplicative of information otherwise accessible to the agency, and that the collection of information has practical utility. 5 CFR §1320.4(b).

The regulations further provide that any collection of information specifically mandated by statute or court order will be considered "necessary" by OMB, as will any collection of information "specifically required by an agency rule approved or not acted upon by OMB" under the Act. In addition, OMB has established general guidelines that will be applied unless the agency can demonstrate the need for an exception to them. Among other things, OMB will generally not approve a collection of information that requires reporting more often than quarterly; that requires a response in less than 30 days; that requires respondents to submit more than one original and two copies of a document; that requires persons to retain records (other than health, medical or tax records) for more than 3 years; that does not attempt to ease the burden for small entities; that requires respondents to submit proprietary, trade secret, or other confidential information, unless the agency has instituted permissible procedures to protect the information; or that requires persons to maintain or provide information in a format other than that in which it is customarily maintained. 5 CFR §1320.6.

Also pertinent to OMB's authority is section 3518(e) of the Act, which states:

> "Nothing in [the Act] shall be interpreted as increasing or decreasing the authority of the President, the Office of Management and Budget or the Director thereof, under the laws of the United States, with respect to the substantive policies and programs of departments, agencies, and offices, including the substantive authority of any Federal agency to enforce the civil rights laws."

15

Information Management. The Paperwork Reduction Act also authorizes OMB to develop and implement uniform policies on information resources management by federal agencies. OMB has done this through Circular A-130, which sets out various policies agencies are to use in managing government information. 50 Fed. Reg. 52730 (Dec.24, 1985). Circular A-130, originally issued in 1985, is in the process of being amended. See 57 Fed. Reg. 18296 (April 29, 1992).

Legislative History:

The Paperwork Reduction Act of 1980 replaced the Federal Reports Act of 1942 as the basic statute controlling paperwork requirements imposed on the public by the federal government. The Act was amended in 1986.

The Paperwork Reduction Act was originally enacted as part of the regulatory reform movement of the 1970s. Reacting to growing public concern over the burden imposed by federal information collections, Congress established the Commission on Federal Paperwork in late 1974. The Commission, in its report in 1977, made 770 recommendations for reducing the federal paperwork burden. Legislation implementing some of the recommendations was introduced in both the 95th and 96th Congresses, and the Paperwork Reduction Act was passed in November 1980, and signed by President Carter on December 11, 1980.

Conflicts over the interpretations of certain provisions of the Act resulted in amendments enacted in 1986. Among the amendments was language clarifying the relationship between the procedures required for clearance of information collections in proposed rules and other proposed information collections.

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10. Office of Management and Budget, Management of Federal Information Resources, Proposed Revision of OMB Circular A-130, 57 Fed. Reg. 18926 (April 29, 1992).

11. *Oversight of the Paperwork Reduction Act of 1980: Hearing Before the Subcommittee on Information Management and Regulatory Affairs of the Senate Committee on Governmental Affairs*, 98th Cong., 1st Sess. (1983).

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13. *Reauthorization of OMB's Office of Information and Regulatory Affairs: Hearings before the Senate Committee on Governmental Affairs*, 101st Cong., 2d Sess. (1990).

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6. Perritt, *Federal Agency Electronic Records Management and Archives*, Report to the Administrative Conference of the U.S., 1990 ACUS 389.

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Consumer Product Safety Commission	16 CFR §1033
Federal Emergency Management Agency	18 CFR §389
Internal Revenue Service	6 CFR §795
National Credit Union Administration	12 CFR §795
National Oceanic and Atmospheric Administration	50 CFR §204
Office of Federal Contract Compliance Programs	41 CFR §60-999

Appendix:

1. Paperwork Reduction Act, 44 U.S.C. §§3501-3520 (1988).

2. Office of Management and Budget, Controlling Paperwork Burdens on the Public, 5 CFR Part 1320 (1991).

Paperwork Reduction Act

Title 44, U.S. Code

Chapter 35--Coordination of Federal Information Policy

§3501. Purpose.
§3502. Definitions.
§3503. Office of Information and Regulatory Affairs.
§3504. Authority and functions of Director.
§3505. Assignment of tasks and deadlines.
§3506. Federal agency responsibilities.
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§3508. Determination of necessity for information; hearing.
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§3511. Establishment and operation of Federal Information Locator System.
§3512. Public protection.
§3513. Director review of agency activities; reporting; agency response.
§3514. Responsiveness to Congress.
§3515. Administrative powers.
§3516. Rules and regulations.
§3517. Consultation with other agencies and the public.
§3518. Effect on existing laws and regulations.
§3519. Access to information.
§3520. Authorization of appropriations.

§3501. Purpose

The purpose of this chapter is-

(1) to minimize the Federal paperwork burden for individuals, small businesses, State and local governments, and other persons;

(2) to minimize the cost to the Federal Government of collecting, maintaining, using, and disseminating information;

(3) to maximize the usefulness of information collected, maintained, and disseminated by the Federal Government;

(4) to coordinate, integrate and, to the extent practicable and appropriate, make uniform Federal information policies and practices;

(5) to ensure that automatic data processing, telecommunications, and other information technologies are acquired and used by the Federal Government in a manner which improves service delivery and program management, increases productivity, improves the quality of decisionmaking, reduces waste and fraud,

and wherever practicable and appropriate, reduces the information processing burden for the Federal Government and for persons who provide information to and for the Federal Government; and

(6) to ensure that the collection, maintenance, use and dissemination of information by the Federal Government is consistent with applicable laws relating to confidentiality, including section 552a of title 5, United States Code, known as the Privacy Act.

(Added Pub. L. No. 96-511, §2(a), Dec. 11, 1980, 94 Stat. 2812, and Pub. L. No. 99-500, §101(m) [title VIII, §811], Oct. 18, 1986, 100 Stat. 1783-308, 1783-335, and Pub. L. No. 99-591, §101(m) [title VIII, §811], Oct. 30, 1986, 100 Stat. 3341-308, 3341-335.)

§3502. Definitions

As used in this chapter-

(1) the term "agency" means any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency, but does not include the General Accounting Office, Federal Election Commission, the governments of the District of Columbia and of the territories and possessions of the United States, and their various subdivisions, or Government-owned contractor-operated facilities including laboratories engaged in national defense research and production activities;

(2) the terms "automatic data processing," "automatic data processing equipment," and "telecommunications" do not include any data processing or telecommunications system or equipment, the function, operation or use of which-

(A) involves intelligence activities;

(B) involves cryptologic activities related to national security;

(C) involves the direct command and control of military forces;

(D) involves equipment which is an integral part of a weapon or weapons system; or

(E) is critical to the direct fulfillment of military or intelligence missions, provided that this exclusion shall not include automatic data processing or telecommunications equipment used for routine administrative and business applications such as payroll, finance, logistics, and personnel management;

(3) the term "burden" means the time, effort, or financial resources expended by persons to provide information to a Federal agency;

(4) the term "collection of information" means the obtaining or soliciting of facts or opinions by an agency through the use of written report forms, application forms, schedules, questionnaires, reporting or recordkeeping requirements, or other similar methods calling for either-

(A) answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons, other than agencies, instrumentalities, or employees of the United States; or

(B) answers to questions posed to agencies, instrumentalities, or employees of the United States which are to be used for general statistical purposes;

(5) the term "data element" means a distinct piece of information such as a name, term, number, abbreviation, or symbol;

(6) the term "data element dictionary" means a system containing standard and uniform definitions and cross references for commonly used data elements;

(7) the term "data profile" means a synopsis of the questions contained in an information collection request and the official name of the request, the location of information obtained or to be obtained through the request, a description of any compilations, analyses, or reports derived or to be derived from such information, any record retention requirements associated with the request, the agency responsible for the request, the statute authorizing the request, and any other information necessary to identify, obtain, or use the data contained in such information;

(8) the term "Director" means the Director of the Office of Management and Budget;

(9) the term "directory of information resources" means a catalog of information collection requests, containing a data profile for each request;

(10) the term "independent regulatory agency" means the Board of Governors of the Federal Reserve System, the Commodity Futures Trading Commission, the Consumer Product Safety Commission, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Energy Regulatory Commission, the Federal Housing Finance Board, the Federal Maritime Commission, the Federal Trade Commission, the Interstate Commerce Commission, the Mine Enforcement Safety and Health Review Commission, the National Labor Relations Board, the Nuclear Regulatory Commission, the Occupational Safety and Health Review Commission, the Postal Rate Commission, the Securities and Exchange Commission, and any other similar agency designated by statute as a Federal independent regulatory agency or commission;

(11) the term "information collection request" means a written report form, application form, schedule, questionnaire, reporting or recordkeeping requirement, collection of information requirement, or other similar method calling for the collection of information;

(12) the term "information referral service" means the function that assists officials and persons in obtaining access to the Federal Information Locator System;

(13) the term "information resources management" means the planning, budgeting, organizing, directing, training, promoting, controlling, and management activities associated with the burden, collection, creation, use, and dissemination of information by agencies, and includes the management of information and related resources such as automatic data processing equipment (as such term is defined in section 111(a) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 759(a));

(14) the term "information systems" means management information systems;

(15) the term "person" means an individual, partnership, association, corporation, business trust, or legal representative, an organized group of individuals, a State, territorial, or local government or branch thereof, or a political subdivision of a State, territory, or local government or a branch of a political subdivision;

(16) the term "practical utility" means the ability of an agency to use information it collects, particularly the capability to process such information in a timely and useful fashion; and

(17) the term "recordkeeping requirement" means requirement imposed by an agency on persons to maintain specified records.
(Added Pub. L. No. 96-511, §2(a), Dec. 11, 1980, 94 Stat. 2813, and amended Pub. L. No. 98-443, §9(h), Oct. 4, 1984, 98 Stat. 1708; Pub. L. No. 99-500, §101(m) [title VIII, §812], Oct. 18, 1986, 100 Stat. 1783-308, 1783-335, and Pub. L. No. 99-591, §101(m) [title VIII, §812], Oct. 30, 1986, 100 Stat. 3341-308, 3341-335; Pub. L. No. 101-73, title VII, §744(e), Aug. 9, 1989, 103 Stat. 438.)

§3503. Office of Information and Regulatory Affairs

(a) There is established in the Office of Management and Budget an office to be known as the Office of Information and Regulatory Affairs.

(b) There shall be at the head of the Office an Administrator who shall be appointed by the President, by and with the advice and consent of the Senate. The Director shall delegate to the Administrator the authority to administer all functions under this chapter, except that any such delegation shall not relieve the Director of responsibility for the administration of such functions. The Administrator shall serve as principal adviser to the Director on Federal information policy and shall report directly to the Director.
(Added Pub. L. No. 96-511, §2(a), Dec. 11, 1980, 94 Stat. 2814, and amended Pub. L. No. 99-500, §101(m) [title VIII, §813(a)], Oct. 18, 1986, 100 Stat. 1783-308, 1783-336, and Pub. L. No. 99-591, §101(m) [title VIII, §813(a)], Oct. 30, 1986, 100 Stat. 3341-308, 3341-336.)

§3504. Authority and functions of Director

(a) The Director shall develop and implement Federal information policies, principles, standards, and guidelines and shall provide direction and oversee the review and approval of information collection requests, the reduction of the paperwork burden, Federal statistical activities, records management activities, privacy and security of records, agency sharing and dissemination of information, and acquisition and use of automatic data processing, telecommunications, and other information technology for managing information resources. The authority of the Director under this section shall be exercised consistent with applicable law.

(b) The general information policy functions of the Director shall include-

(1) developing and implementing uniform and consistent information resources management policies and overseeing the development of information management principles, standards, and guidelines and promoting their use;

(2) initiating and reviewing proposals for changes in legislation, regulations, and agency procedures to improve information practices, and informing the President and the Congress on the progress made therein;

(3) coordinating, through the review of budget proposals and as otherwise provided in this section, agency information practices;

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(4) promoting, through the use of the Federal Information Locator System, the review of budget proposals and other methods, greater sharing of information by agencies;

(5) evaluating agency information management practices to determine their adequacy and efficiency, and to determine compliance of such practices with the policies, principles, standards, and guidelines promulgated by the Director; and

(6) overseeing planning for, and conduct of research with respect to, Federal collection, processing, storage, transmission, and use of information.

(c) The information collection request clearance and other paperwork control functions of the Director shall include-

(1) reviewing and approving information collection requests proposed by agencies;

(2) determining whether the collection of information by an agency is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility for the agency;

(3) ensuring that all information collection requests-

(A) are inventoried, display a control number and, when appropriate, an expiration date;

(B) indicate the request is in accordance with the clearance requirements of section 3507; and

(C) contain a statement to inform the person receiving the request why the information is being collected, how it is to be used, and whether responses to the request are voluntary, required to obtain a benefit, or mandatory;

(4) designating as appropriate, in accordance with section 3509, a collection agency to obtain information for two or more agencies;

(5) setting goals for reduction of the burdens of Federal information collection requests;

(6) overseeing action on the recommendations of the Commission on Federal Paperwork; and

(7) designing and operating, in accordance with section 3511, the Federal Information Locator System.

(d) The statistical policy and coordination functions of the Director shall include-

(1) developing and periodically reviewing and, as necessary, revising long-range plans for the improved coordination and performance of the statistical activities and programs of the Federal Government;

(2) reviewing budget proposals of agencies to assure that the proposals are consistent with such long-range plans;

(3) coordinating, through the review of budget proposals and as otherwise provided in this chapter, the functions of the Federal Government with respect to gathering, interpreting, and disseminating statistics and statistical information;

(4) developing and implementing Government-wide policies, principles, standards, and guidelines concerning statistical collection procedures and methods, statistical data classification, statistical information presentation and dissemination, and such statistical data sources as may be required for the administration of Federal programs;

(5) evaluating statistical program performance and agency compliance with Government-wide policies, principles, standards, and guidelines;

(6) integrating the functions described in paragraphs (1) through (5) of this subsection with the other information resources management functions specified in this chapter; and

(7) appointing a chief statistician who is a trained and experienced professional statistician to carry out the functions described in paragraphs (1) through (6) of this subsection.

(e) The records management functions of the Director shall include-

(1) providing advice and assistance to the Archivist of the United States and the Administrator of General Services in order to promote coordination in the administration of chapters 29, 31, and 33 of this title with the information policies, principles, standards, and guidelines established under this chapter;

(2) reviewing compliance by agencies with the requirements of chapters 29, 31, and 33 of this title and with regulations promulgated by the Archivist of the United States and the Administrator of General Services thereunder; and

(3) coordinating records management policies and programs with related information programs such as information collection, statistics, automatic data processing and telecommunications, and similar activities.

(f) The privacy functions of the Director shall include-

(1) developing and implementing policies, principles, standards, and guidelines on information disclosure and confidentiality, and on safeguarding the security of information collected or maintained by or on behalf of agencies;

(2) providing agencies with advice and guidance about information security, restriction, exchange, and disclosure; and

(3) monitoring compliance with section 552a of title 5, United States Code, and related information management laws.

(g) The Federal automatic data processing (including telecommunications) functions of the Director shall include-

(1) developing and implementing policies, principles, standards, and guidelines for automatic data processing (including telecommunications) functions and activities of the Federal Government, and overseeing the establishment of standards under section 111(d) of the Federal Property and Administrative Services Act of 1949;

(2) monitoring the effectiveness of, and compliance with, directives issued pursuant to sections 110 and 111 of such Act of 1949 and reviewing proposed determinations under section 111(e) of such Act;

(3) providing advice and guidance on the acquisition and use of automatic data processing (including telecommunications) equipment, and coordinating, through the review of budget proposals and other methods, agency proposals for acquisition and use of such equipment;

(4) promoting the use of automatic data processing (including telecommunications) equipment by the Federal Government to improve the effectiveness of the use and dissemination of data in the operation of Federal programs; and

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(5) initiating and reviewing proposals for changes in legislation, regulations, and agency procedures to improve automatic data processing (including telecommunications) practices, and informing the President and the Congress of the progress made therein.

(h)(1) As soon as practicable, but no later than publication of a notice of proposed rulemaking in the Federal Register, each agency shall forward to the

Director a copy of any proposed rule which contains a collection of information requirement and upon request, information necessary to make the determination required pursuant to this section.

(2) Within sixty days after the notice of proposed rulemaking is published in the Federal Register, the Director may file public comments pursuant to the standards set forth in section 3508 on the collection of information requirement contained in the proposed rule.

(3) When a final rule is published in the Federal Register, the agency shall explain how any collection of information requirement contained in the final rule responds to the comments, if any, filed by the Director or the public, or explain why it rejected those comments.

(4) The Director has no authority to disapprove any collection of information requirement specifically contained in an agency rule, if he has received notice and failed to comment on the rule within sixty days of the notice of proposed rulemaking.

(5) Nothing in this section prevents the Director, in his discretion-

(A) from disapproving any information collection request which was not specifically required by an agency rule;

(B) from disapproving any collection of information requirement contained in an agency rule, if the agency failed to comply with the requirements of paragraph (1) of this subsection; or[1]

(C) from disapproving any collection of information requirement contained in a final agency rule, if the Director finds within sixty days of the publication of the final rule that the agency's response to his comments filed pursuant to paragraph (2) of this subsection was unreasonable.

(D) from disapproving any collection of information requirement where the Director determines that the agency has substantially modified in the final rule the collection of information requirement contained in the proposed rule where the agency has not given the Director the information required in paragraph (1), with respect to the modified collection of information requirement, at least sixty days before the issuance of the final rule.

(6) The Director shall make publicly available any decision to disapprove a collection of information requirement contained in an agency rule, together with the reasons for such decision.

(7) The authority of the Director under this subsection is subject to the provisions of section 3507(c).

(8) This subsection shall apply only when an agency publishes a notice of proposed rulemaking and requests public comments.

(9) There shall be no judicial review of any kind of the Director's decision to approve or not to act upon a collection of information requirement contained in an agency rule.

(Added Pub. L. No. 96-511, §2(a), Dec. 11, 1980, 94 Stat. 2815, and amended Pub. L. No. 98-497, title I, §107(b)(26), Oct. 19, 1984, 98 Stat. 2291; Pub. L. No. 99-500, §101(m) [title VIII, §§814, 821(b)(2)], Oct. 18, 1986, 100 Stat. 1783-308, 1783-336, 1783-342, and Pub. L. No. 99-591, §101(m) [title VIII, §§814, 821(b)(2)], Oct. 30, 1986, 100 Stat. 3341-308, 3341-336, 3341-342.)

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[1] So in original. The word "or" probably should not appear.

§3505. Assignment of tasks and deadlines

In carrying out the functions under this chapter, the Director shall-

(1) upon enactment of this Act-

(A) set a goal to reduce the then existing burden of Federal collections of information by 15 per centum by October 1, 1982; and

(B) for the year following, set a goal to reduce the burden which existed upon enactment by an additional 10 per centum;

(2) within one year after the effective date of this Act-

(A) establish standards and requirements for agency audits of all major information systems and assign responsibility for conducting Government-wide or multiagency audits, except the Director shall not assign such responsibility for the audit of major information systems used for the conduct of criminal investigations or intelligence activities as defined in section 4-206 of Executive Order 12036, issued January 24, 1978, or successor orders, or for cryptologic activities that are communications security activities;

(B) establish the Federal Information Locator System;

(C) identify areas of duplication in information collection requests and develop a schedule and methods for eliminating duplication;

(D) develop a proposal to augment the Federal Information Locator System to include data profiles of major information holdings of agencies (used in the conduct of their operations) which are not otherwise required by this chapter to be included in the System; and

(E) identify initiatives which may achieve a 10 per centum reduction in the burden of Federal collections of information associated with the administration of Federal grant programs;

(3) within two years after the effective date of this Act-

(A) establish a schedule and a management control system to ensure that practices and programs of information handling disciplines, including records management, are appropriately integrated with the information policies mandated by this chapter;

(B) identify initiatives to improve productivity in Federal operations using information processing technology;

(C) develop a program to (i) enforce Federal information processing standards, particularly software language standards, at all Federal installations; and (ii) revitalize the standards development program established pursuant to section 759(f)(2) of title 40, United States Code, separating it from peripheral technical assistance functions and directing it to the most productive areas;

(D) complete action on recommendations of the Commission on Federal Paperwork by implementing, implementing with modification or rejecting such recommendations including, where necessary, development of legislation to implement such recommendations;

(E) develop and annually revise, in consultation with the Administrator of General Services, a 5-year plan for meeting the automatic data processing equipment (including telecommunications) and other information technology needs of the Federal Government in accordance with the requirements of sections 110 and 111 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 757, 759) and the purposes of this chapter; and

(F) submit to the President and the Congress legislative proposals to remove inconsistencies in laws and practices involving privacy, confidentiality, and disclosure of information;

(4) upon the enactment of the Paperwork Reduction Reauthorization Act of 1986-

(A) set a goal to reduce, by September 30, 1987, the burden of Federal collections of information existing on September 30, 1986, by at least 5 percent; and

(B) for the fiscal year beginning on October 1, 1987, and each of the next two fiscal years, set a goal to reduce the burden of Federal collections of information existing at the end of the immediately preceding fiscal year by at least 5 percent;

(5) maintain a comprehensive set of information resources management policies; and

(6) within one year after the date of enactment of the Paperwork Reduction Reauthorization Act of 1986-

(A) issue, in consultation with the Administrator of General Services, principles, standards, and guidelines to implement the policies described in paragraph (5);

(B) report to the Congress on the feasibility and means of enhancing public access, including access by electronic media, to information relating to information collection requests required by this chapter to be made available to the public; and

(C) identify further initiatives to reduce the burden of Federal collections of information associated with the administration of Federal grant programs.

(Added Pub. L. No. 96-511, §2(a), Dec. 11, 1980, 94 Stat. 2818, and amended Pub. L. No. 99-500, §101(m) [title VIII, §815], Oct. 18, 1986, 100 Stat. 1783-308, 1783-337, and Pub. L. No. 99-591, §101(m) [title VIII, §815], Oct. 30, 1986, 100 Stat. 3341-308, 3341-337.)

§3506. Federal agency responsibilities

(a) Each agency shall be responsible for carrying out its information management activities in an efficient, effective, and economical manner, and for complying with the information policies, principles, standards, and guidelines prescribed by the Director.

(b) The head of each agency shall designate, within three months after the effective date of this Act, a senior official or, in the case of military departments, and the Office of the Secretary of Defense, officials who report directly to such agency head to carry out the responsibilities of the agency under this chapter. If more than one official is appointed for the military departments the respective duties of the officials shall be clearly delineated.

(c) Each agency shall-

(1) systematically inventory its major information systems and periodically review its information resources management activities;

(2) ensure its information systems do not overlap each other or duplicate the systems of other agencies;

(3) develop procedures for assessing the paperwork and reporting burden of proposed legislation affecting such agency;

(4) assign to the official designated under subsection (b) the responsibility for the conduct of and accountability for any acquisitions made pursuant to a delegation of authority under section 111 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 759);

(5) ensure that information collection requests required by law or to obtain a benefit, and submitted to nine or fewer persons, contain a statement to inform the person receiving the request that the request is not subject to the requirements of section 3507 of this chapter; and[2]

(6) implement applicable Government-wide and agency information policies, principles, standards, and guidelines with respect to information collection, paperwork reduction, statistical activities, records management activities, privacy and security of records, sharing and dissemination of information, acquisition and use of information technology, and other information resource management functions;

(7) periodically evaluate and, as needed, improve, the accuracy, completeness, and reliability of data and records contained within Federal information systems; and

(8) develop and annually revise a 5-year plan, in accordance with appropriate guidance provided by the Director, for meeting the agency's information technology needs.

(d) The head of each agency shall establish such procedures as necessary to ensure the compliance of the agency with the requirements of the Federal Information Locator System, including necessary screening and compliance activities.

(Added Pub. L. No. 96-511, §2(a), Dec. 11, 1980, 94 Stat. 2819, and amended Pub. L. No. 99-500, §101(m) [title VIII, §816], Oct. 18, 1986, 100 Stat. 1783-308, 1783-338, and Pub. L. No. 99-591, §101(m) [title VIII, §816], Oct. 30, 1986, 100 Stat. 3341-308, 3341-338.)

§3507. Public information collection activities-submission to Director; approval and delegation

(a) An agency shall not conduct or sponsor the collection of information unless, in advance of the adoption or revision of the request for collection of such information-

(1) the agency has taken actions, including consultation with the Director, to-

(A) eliminate, through the use of the Federal Information Locator System and other means, information collections which seek to obtain information available from another source within the Federal Government;

(B) reduce to the extent practicable and appropriate the burden on persons who will provide information to the agency; and

(C) formulate plans for tabulating the information in a manner which will enhance its usefulness to other agencies and to the public;

(2) the agency (A) has submitted to the Director the proposed information collection request, copies of pertinent regulations and other related materials as the Director may specify, and an explanation of actions taken to carry out paragraph (1) of this subsection, and (B) has prepared a notice to be published in

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[2] So in original. The word "and" probably should not appear.

the Federal Register stating that the agency has made such submission and setting forth a title for the information collection request, a brief description of the need for the information and its proposed use, a description of the likely respondents and proposed frequency of response to the information collection request, and an estimate of the burden that will result from the information collection request; and

(3) the Director has approved the proposed information collection request, or the period for review of information collection requests by the Director provided under subsection (b) has elapsed.

(b) The Director shall, within sixty days of receipt of a proposed information collection request, notify the agency involved of the decision to approve or disapprove the request and shall make such decisions, including an explanation thereof, publicly available. If the Director determines that a request submitted for review cannot be reviewed within sixty days, the Director may, after notice to the agency involved, extend the review period for an additional thirty days. If the Director does not notify the agency of an extension, denial, or approval within sixty days (or, if the Director has extended the review period for an additional thirty days and does not notify the agency of a denial or approval within the time of the extension), a control number shall be assigned without further delay, the approval may be inferred, and the agency may collect the information for not more than one year.

(c) Any disapproval by the Director, in whole or in part, of a proposed information collection request of an independent regulatory agency, or an exercise of authority under section 3504(h) or 3509 concerning such an agency, may be voided, if the agency by a majority vote of its members overrides the Director's disapproval or exercise of authority. The agency shall certify each override to the Director, shall explain the reasons for exercising the override authority. Where the override concerns an information collection request, the Director shall without further delay assign a control number to such request, and such override shall be valid for a period of three years.

(d) The Director may not approve an information collection request for a period in excess of three years.

(e) If the Director finds that a senior official of an agency designated pursuant to section 3506(b) is sufficiently independent of program responsibility to evaluate fairly whether proposed information collection requests should be approved and has sufficient resources to carry out this responsibility effectively, the Director may, by rule in accordance with the notice and comment provisions of chapter 5 of title 5, United States Code, delegate to such official the authority to approve proposed requests in specific program areas, for specific purposes, or for all agency purposes. A delegation by the Director under this section shall not preclude the Director from reviewing individual information collection requests if the Director determines that circumstances warrant such a review. The Director shall retain authority to revoke such delegations, both in general and with regard to any specific matter. In acting for the Director, any official to whom approval authority has been delegated under this section shall comply fully with the rules and regulations promulgated by the Director.

(f) An agency shall not engage in a collection of information without obtaining from the Director a control number to be displayed upon the information collection request.

(g) If an agency head determines a collection of information (1) is needed prior to the expiration of the sixty-day period for the review of information collection requests established pursuant to subsection (b), (2) is essential to the mission of the agency, and (3) the agency cannot reasonably comply with the provisions of this chapter within such sixty-day period because (A) public harm will result if normal clearance procedures are followed, or (B) an unanticipated event has occurred and the use of normal clearance procedures will prevent or disrupt the collection of information related to the event or will cause a statutory deadline to be missed, the agency head may request the Director to authorize such collection of information prior to expiration of such sixty-day period. The Director shall approve or disapprove any such authorization request within the time requested by the agency head and, if approved, shall assign the information collection request a control number. Any collection of information conducted pursuant to this subsection may be conducted without compliance with the provisions of this chapter for a maximum of ninety days after the date on which the Director received the request to authorize such collection.

(h) Any written communication to the Administrator of the Office of Information and Regulatory Affairs or to any employee thereof from any person not employed by the Federal Government or from an agency concerning a proposed information collection request, and any written communication from the Administrator or employee of the Office to such person or agency concerning such proposal, shall be made available to the public. This subsection shall not require the disclosure of any information which is protected at all times by procedures established for information which has been specifically authorized under criteria established by an Executive order or an Act of Congress to be kept secret in the interest of national defense or foreign policy.
(Added Pub. L. No. 96-511, §2(a), Dec. 11, 1980, 94 Stat. 2819, amended Pub. L. No. 99-500, §101(m) [title VIII, §817], Oct. 18, 1986, 100 Stat. 1783-308, 1783-338, and Pub. L. No. 99-591, §101(m) [title VIII, §817], Oct. 30, 1986, 100 Stat. 3341-308, 3341-338.)

§3508. Determination of necessity for information; hearing

Before approving a proposed information collection request, the Director shall determine whether the collection of information by an agency is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility. Before making a determination the Director may give the agency and other interested persons an opportunity to be heard or to submit statements in writing. To the extent, if any, that the Director determines that the collection of information by an agency is unnecessary, for any reason, the agency may not engage in the collection of the information.
(Added Pub. L. No. 96-511, §2(a), Dec. 11, 1980, 94 Stat. 2821.)

§3509. Designation of central collection agency

The Director may designate a central collection agency to obtain information for two or more agencies if the Director determines that the needs of such agencies for information will be adequately served by a single collection agency, and such sharing of data is not inconsistent with any applicable law. In such cases

the Director shall prescribe (with reference to the collection of information) the duties and functions of the collection agency so designated and of the agencies for which it is to act as agent (including reimbursement for costs). While the designation is in effect, an agency covered by it may not obtain for itself information which it is the duty of the collection agency to obtain. The Director may modify the designation from time to time as circumstances require. The authority herein is subject to the provisions of section 3507(c) of this chapter.
(Added Pub. L. No. 96-511, §2(a), Dec. 11, 1980, 94 Stat. 2821.)

§3510. Cooperation of agencies in making information available

(a) The Director may direct an agency to make available to another agency, or an agency may make available to another agency, information obtained pursuant to an information collection request if the disclosure is not inconsistent with any applicable law.

(b) If information obtained by an agency is released by that agency to another agency, all the provisions of law (including penalties which relate to the unlawful disclosure of information) apply to the officers and employees of the agency to which information is released to the same extent and in the same manner as the provisions apply to the officers and employees of the agency which originally obtained the information. The officers and employees of the agency to which the information is released, in addition, shall be subject to the same provisions of law, including penalties, relating to the unlawful disclosure of information as if the information had been collected directly by that agency.
(Added Pub. L. No. 96-511, §2(a), Dec. 11, 1980, 94 Stat. 2822.)

§3511. Establishment and operation of Federal Information Locator System

(a) There is established in the Office of Information and Regulatory Affairs a Federal Information Locator System (hereafter in this section referred to as the "system") which shall be composed of a directory of information resources, a data element dictionary, and an information referral service. The system shall serve as the authoritative register of all information collection requests, and shall be designed so as to assist agencies and the public in locating existing Government information derived from information collection requests.

(b) In designing and operating the System, the Director shall-

(1) design and operate an indexing system for the System;

(2) require the head of each agency to prepare in a form specified by the Director, and to submit to the Director for inclusion in the System, a data profile for each information collection request of such agency;

(3) compare data profiles for proposed information collection requests against existing profiles in the System, and make available the results of such comparison to-

(A) agency officials who are planning new information collection activities; and

(B) on request, members of the general public; and

(4) ensure that no actual data, except descriptive data profiles necessary to identify duplicative data or to locate information, are contained within the System.

(Added Pub. L. No. 96-511, §2(a), Dec. 11, 1980, 94 Stat. 2822, and amended Pub. L. No. 99-500, §101(m) [title VIII, §818], Oct. 18, 1986, 100 Stat. 1783-308, 1783-339, and Pub. L. No. 99-591, §101(m) [title VIII, §818], Oct. 30, 1986, 100 Stat. 3341-308, 3341-339.)

§3512. Public protection

Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to maintain or provide information to any agency if the information collection request involved was made after December 31, 1981, and does not display a current control number assigned by the Director, or fails to state that such request is not subject to this chapter.
(Added Pub. L. No. 96-511, §2(a), Dec. 11, 1980, 94 Stat. 2822.)

§3513. Director review of agency activities; reporting; agency response

(a) The Director shall, with the advice and assistance of the Administrator of General Services and the Archivist of the United States, selectively review, at least once every three years, the information management activities of each agency to ascertain their adequacy and efficiency. In evaluating the adequacy and efficiency of such activities, the Director shall pay particular attention to whether the agency has complied with section 3506.

(b) The Director shall report the results of the reviews to the appropriate agency head, the House Committee on Government Operations, the Senate Committee on Governmental Affairs, the House and Senate Committees on Appropriations, and the committees of the Congress having jurisdiction over legislation relating to the operations of the agency involved.

(c) Each agency which receives a report pursuant to subsection (b) shall, within sixty days after receipt of such report, prepare and transmit to the Director, the House Committee on Government Operations, the Senate Committee on Governmental Affairs, the House and Senate Committees on Appropriations, and the committees of the Congress having jurisdiction over legislation relating to the operations of the agency, a written statement responding to the Director's report, including a description of any measures taken to alleviate or remove any problems or deficiencies identified in such report.
(Added Pub. L. No. 96-511, §2(a), Dec. 11, 1980, 94 Stat. 2822, and amended Pub. L. No. 98-497, title I, §107(b)(27), Oct. 19, 1984, 98 Stat. 2291.)

§3514. Responsiveness to Congress

(a) The Director shall keep the Congress and its committees fully and currently informed of the major activities under this chapter, and shall submit a report thereon to the President of the Senate and the Speaker of the House of Representatives annually and at such other times as the Director determines necessary. The Director shall include in any such report-

(1) proposals for legislative action needed to improve Federal information management, including, with respect to information collection, recommendations to reduce the burden on individuals, small businesses, State and local governments, and other persons;

(2) a compilation of legislative impediments to the collection of information which the Director concludes that an agency needs but does not have authority to collect;

(3) an analysis by agency, and by categories the Director finds useful and practicable, describing the estimated reporting hours required of persons by information collection requests, including to the extent practicable the direct budgetary costs of the agencies and identification of statutes and regulations which impose the greatest number of reporting hours;

(4) a summary of accomplishments and planned initiatives to reduce burdens of Federal information collection requests;

(5) a tabulation of areas of duplication in agency information collection requests identified during the preceding year and efforts made to preclude the collection of duplicate information, including designations of central collection agencies;

(6) a list of each instance in which an agency engaged in the collection of information under the authority of section 3507(g) and an identification of each agency involved;

(7) a list of all violations of provisions of this chapter and rules, regulations, guidelines, policies, and procedures issued pursuant to this chapter;

(8) with respect to recommendations of the Commission on Federal Paperwork-

(A) a description of the specific actions taken on or planned for each recommendation;

(B) a target date for implementing each recommendation accepted but not implemented; and

(C) an explanation of the reasons for any delay in completing action on such recommendations;

(9)(A) a summary of accomplishments in the improvement of, and planned initiatives to improve, Federal information resources management within agencies;

(B) a detailed statement with respect to each agency of new initiatives to acquire information technology to improve such management; and

(C) an analysis of the extent to which the policies, principles, standards, and guidelines issued and maintained pursuant to paragraphs (5) and (6) of section 3505 of this title promote or deter such new initiatives; and

(10) with respect to the statistical policy and coordination functions described in section 3504(d) of this title-

(A) a description of the specific actions taken, or planned to be taken, to carry out each such function;

(B) a description of the status of each major statistical program, including information on-

(i) any improvements in each such program;

(ii) any program which has been reduced or eliminated; and

(iii) the budget for each such program for the previous fiscal year and the fiscal year in progress and the budget proposed for each such program for the next fiscal year; and

(C) a description and summary of the long-range plans currently in effect for the major Federal statistical activities and programs.

(b) The preparation of any report required by this section shall not increase the collection of information burden on persons outside the Federal Government.

(Added Pub. L. No. 96-511, §2(a), Dec. 11, 1980, 94 Stat. 2823, and Pub. L. No. 99-500, §101(m) [title VIII, §819], Oct. 18, 1986, 100 Stat. 1783-308, 1783-339, and Pub. L. No. 99-591, §101(m) [title VIII, §819], Oct. 30, 1986, 100 Stat. 3341-308, 3341-339.)

§3515. Administrative powers

Upon the request of the Director, each agency (other than an independent regulatory agency) shall, to the extent practicable, make its services, personnel, and facilities available to the Director for the performance of functions under this chapter.
(Added Pub. L. No. 96-511, §2(a), Dec. 11, 1980, 94 Stat. 2824.)

§3516. Rules and regulations

The Director shall promulgate rules, regulations, or procedures necessary to exercise the authority provided by this chapter.
(Added Pub. L. No. 96-511, §2(a), Dec. 11, 1980, 94 Stat. 2824.)

§3517. Consultation with other agencies and the public

In development of information policies, plans, rules, regulations, procedures, and guidelines and in reviewing information collection requests, the Director shall provide interested agencies and persons early and meaningful opportunity to comment.
(Added Pub. L. No. 96-511, §2(a), Dec. 11, 1980, 94 Stat. 2824.)

§3518. Effect on existing laws and regulations

(a) Except as otherwise provided in this chapter, the authority of an agency under any other law to prescribe policies, rules, regulations, and procedures for Federal information activities is subject to the authority conferred on the Director by this chapter.

(b) Nothing in this chapter shall be deemed to affect or reduce the authority of the Secretary of Commerce or the Director of the Office of Management and Budget pursuant to Reorganization Plan No. 1 of 1977 (as amended) and Executive order, relating to telecommunications and information policy, procurement and management of telecommunications and information systems, spectrum use, and related matters.

(c)(1) Except as provided in paragraph (2), this chapter does not apply to the collection of information-

(A) during the conduct of a Federal criminal investigation or prosecution, or during the disposition of a particular criminal matter;

(B) during the conduct of (i) a civil action to which the United States or any official or agency thereof is a party or (ii) an administrative action or investigation involving an agency against specific individuals or entities;

(C) by compulsory process pursuant to the Antitrust Civil Process Act and section 13 of the Federal Trade Commission Improvements Act of 1980; or

(D) during the conduct of intelligence activities as defined in section 4-206 of Executive Order 12036, issued January 24, 1978, or successor orders, or during the conduct of cryptologic activities that are communications security activities.

(2) This chapter applies to the collection of information during the conduct of general investigations (other than information collected in an antitrust investigation to the extent provided in subparagraph (C) of paragraph (1)) undertaken with reference to a category of individuals or entities such as a class of licensees or an entire industry.

(d) Nothing in this chapter shall be interpreted as increasing or decreasing the authority conferred by Public Law 89-306 on the Administrator of the General Services Administration, the Secretary of Commerce, or the Director of the Office of Management and Budget.

(e) Nothing in this chapter shall be interpreted as increasing or decreasing the authority of the President, the Office of Management and Budget or the Director thereof, under the laws of the United States, with respect to the substantive policies and programs of departments, agencies and offices, including the substantive authority of any Federal agency to enforce the civil rights laws.
(Added Pub. L. No. 96-511, §2(a), Dec. 11, 1980, 94 Stat. 2824.)

§3519. Access to information

Under the conditions and procedures prescribed in section 716 of title 31, the Director and personnel in the Office of Information and Regulatory Affairs shall furnish such information as the Comptroller General may require for the discharge of his responsibilities. For this purpose, the Comptroller General or representatives thereof shall have access to all books, documents, papers and records of the Office.
(Added Pub. L. No. 96-511, §2(a), Dec. 11, 1980, 94 Stat. 2825, and amended Pub. L. No. 97-258, §3(m)(3), Sept. 13, 1982, 96 Stat. 1066.)

§3520. Authorization of appropriations

(a) Subject to subsection (b), there are authorized to be appropriated to the Office of Information and Regulatory Affairs to carry out the provisions of this chapter, and for no other purpose, $5,500,000 for each of the fiscal years 1987, 1988, and 1989.

(b) No funds may be appropriated pursuant to subsection (a) unless such funds are appropriated in an appropriation Act (or continuing resolution) which separately and expressly states the amount appropriated pursuant to subsection (a) of this section. No funds are authorized to be appropriated to the Office of Information and Regulatory Affairs, or to any other officer or administrative unit of the Office of Management and Budget, to carry out the provisions of this chapter, or to carry out any function under this chapter, for any fiscal year pursuant to any provision of law other than subsection (a) of this section.

(c) Funds appropriated pursuant to subsection (a) may not be used to carry out any function or activity which is not specifically authorized or required by this chapter, but funds so appropriated may be used for necessary expenses of a function or activity which is so authorized or required, such as hire of passenger motor vehicles and services authorized by section 3109 of title 5, United States Code. For the purposes of this subsection, the review of a rule or regulation is specifically authorized or required by this chapter only to the extent that such review is for the sole purpose of reviewing an information collection request contained in, or derived from, such rule or regulation.

(Added Pub. L. No. 96-511, §2(a), Dec. 11, 1980, 94 Stat. 2825, and Pub. L. No. 99-500, §101(m) [title VIII, §820], Oct. 18, 1986, 100 Stat. 1783-308, 1783-340, and Pub. L. No. 99-591, §101(m) [title VIII, §820], Oct. 30, 1986, 100 Stat. 3341-308, 3341-340.)

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Office of Management and Budget
Controlling Paperwork Burdens on the Public
5 CFR Part 1320 (1991)

PART 1320—CONTROLLING PAPERWORK BURDENS ON THE PUBLIC

Sec.

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APPENDIX A TO PART 1320—AGENCIES WITH DELEGATED REVIEW AND APPROVAL AUTHORITY

AUTHORITY: 31 U.S.C. sec. 1111 and 44 U.S.C. Chs. 21, 25, 27, 29, 31, 35.

SOURCE: 53 FR 16623, May 10, 1988, unless otherwise noted.

§ 1320.1 Purpose.

The purpose of this part is to implement the provisions of the Paperwork Reduction Act of 1980, as amended, (44 U.S.C. Chapter 35) (the Act) concerning collections of information. It is issued under the authority of section 3516 of the Act, which provides that "The Director shall promulgate rules, regulations, or procedures necessary to exercise the authority provided by this Chapter." It is designed to minimize and control burdens associated with the collection of information by Federal agencies from individuals, businesses and other private institutions, and State and local governments. In the case of inter-agency reporting, this part establishes policy and promulgates regulations to ensure the effective management of inter-agency reporting requirements in the executive branch, and is promulgated under the authority of the Federal Records Act (44 U.S.C. Chapters 21, 25, 27, 29, 31) and section 104 of the Budget and Accounting Procedures Act of 1950 (31 U.S.C. 1111) as well as the Act.

§ 1320.2 Effect.

This part supersedes and rescinds Circular No. A-40, Revised, dated May 3, 1973, and Transmittal Memorandum No. 1, dated February 10, 1976.

§ 1320.3 Coverage.

The requirements of this part apply to all agencies as defined in § 1320.7(a) and to all collections of information conducted or sponsored by those agencies, as defined in § 1320.7(c), wherever conducted or sponsored, except for collections of information:

(a) By compulsory process pursuant to the Anti-trust Civil Process Act or section 13 of the Federal Trade Commission Improvements Act or section 13 of the Federal Trade Commission Improvements Act of 1980;

(b) During the conduct of intelligence activities, as defined in section 4-206 of Executive Order 12036, issued January 24, 1978, or successor orders, including Executive Order 12333, issued December 4, 1981, or during the conduct of cryptologic activities that are communications securities activities; or

(c) During the conduct of a Federal criminal investigation or prosecution, during the disposition of a particular criminal matter, during the conduct of a civil action to which the United States or any official or agency thereof is a party, or during the conduct of an administrative action or investigation involving an agency against specific individuals or entities. This exception applies during the entire course of the investigation or action, whether before or after formal charges or complaints are filed or formal administrative action is initiated, but only after a case file or its equivalent is opened with respect to a particular party. General collections of information prepared or undertaken with reference to a category of individuals or entities, such as a class of licensees or an industry, do not fall within this exception.

§ 1320.4 General requirements.

(a) An agency shall not engage in a collection of information without obtaining Office of Management and Budget (OMB) approval of the collection of information and displaying a currently valid OMB control number and, unless OMB determines it to be inappropriate, an expiration date. An agency shall not continue to engage in such collection of information after the expiration date of the control number, unless OMB has approved an extension. Each agency shall ensure that collections of information required by law or necessary to obtain a benefit, and which are submitted to nine or fewer persons, inform potential respondents that the collection of information is not subject to OMB review under the Act.

(b) To obtain OMB approval of a collection of information, an agency shall demonstrate that it has taken every reasonable step to ensure that:

(1) The collection of information is the least burdensome necessary for the proper performance of the agency's functions to comply with legal requirements and achieve program objectives;

(2) The collection of information is not duplicative of information otherwise accessible to the agency; and

(3) The collection of information has practical utility. The agency shall also seek to minimize the cost to itself of collecting, processing, and using the information, but shall not do so by means of shifting disproportionate costs or burdens onto the public. It shall also comply with the general information collection guidelines set out in § 1320.6, where applicable, and shall indicate, in its submission of a collection of information for OMB review, what practicable steps it has taken to consult with interested agencies and members of the public in order to minimize the burden of that collection of information.

(c) OMB shall determine whether the collection of information, as submitted by the agency, is necessary for the proper performance of the agency's functions. In making this determination, OMB will take into account the criteria listed in § 1320.4(b), and will consider whether the burden of the collection of information is justified by its practical utility. In addition:

(1) OMB will consider necessary any collection of information specifically mandated by statute or court order, but will independently assess any collection of information to the extent that the agency exercises discretion in its implementation; and

(2) OMB will consider necessary any collection of information specifically required by an agency rule approved or not acted upon by OMB pursuant to § 1320.13 or § 1320.14, but will independently assess any such collection of information to the extent that it deviates from the specifications of the rule.

(d) Except as provided in § 1320.20, to the extent that OMB determines that all or any portion of a collection of information by an agency is unnecessary, for any reason, the agency shall not engage in such collection or portion thereof.

§ 1320.5 Public protection.

(a) Notwithstanding any other provision of law, no person shall be subject to any penalty for failure to comply with any collection of information:

(1) That does not display a currently valid OMB control number; or

(2) In the case of a collection of information required by law or to obtain a benefit which is submitted to nine or fewer persons, that fails to state, as prescribed by § 1320.4(a), that it is not subject to OMB review under the Act.

The failure to display a currently valid OMB control number for a collection of information contained in a current rule does not, as a legal matter, rescind or amend the rule; however, its absence will alert the public that either the agency has failed to comply with applicable legal requirements for

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the collection of information or the collection of information has been disapproved, and that therefore the portion of the rule containing the collection of information has no legal force and effect and the public protection provisions of 44 U.S.C. 3512 apply.

(b) Whenever an agency has imposed a collection of information as a means for proving or satisfying a condition to the receipt of a benefit or the avoidance of a penalty, and the collection of information does not display a currently valid OMB control number or statement, as prescribed in § 1320.4(a), the agency shall not treat a person's failure to comply, in and of itself, as grounds for withholding the benefit or imposing the penalty. The agency shall instead permit respondents to prove or satisfy the legal conditions in any other reasonable manner.

(1) If such a collection of information is disapproved in whole by OMB (and the disapproval is not overridden pursuant to § 1320.20), the agency shall grant the benefit to (or not impose the penalty on) otherwise qualified persons without requesting further proof concerning the condition.

(2) If such a collection of information is ordered modified by OMB (and the order is not overridden pursuant to § 1320.20) the agency shall permit respondents to prove or satisfy the condition by complying with the collection of information as so modified.

(c) Whenever a member of the public is protected from imposition of a penalty under this section for failure to comply with a collection of information, such penalty may not be imposed by an agency directly, by an agency through judicial process, or by any other person through judicial or administrative process.

§ 1320.6 General information collection guidelines.

Unless the agency is able to demonstrate that such collection of information is necessary to satisfy statutory requirements or other substantial need, OMB will not approve a collection of information:

(a) Requiring respondents to report information to the agency more often than quarterly;

(b) Requiring respondents to prepare a written response to a collection of information in fewer than 30 days after receipt of it;

(c) Requiring respondents to submit more than an original and two copies of any document;

(d) Requiring grantees to submit or maintain information other than that required under OMB Circular A-102 or A-110;

(e) Providing for any payment of gift to respondents, other than remuneration of contractors or grantees;

(f) Requiring respondents to retain records, other than health, medical, or tax records, for more than three years;

(g) In connection with a statistical survey that is not designed to produce results that can be generalized to the universe of study;

(h) Unless the agency has taken all practicable steps to develop separate and simplified requirements for small businesses and other small entities;

(i) Requiring respondents to submit proprietary, trade secret, or other confidential information unless the agency can demonstrate that it has instituted procedures to protect its confidentiality to the extent permitted by law;

(j) Requiring respondents to maintain or provide information in a format other than that in which the information is customarily maintained;

(k) Unless the agency has considered reducing the burden on respondents by use of automated collection techniques or other forms of information technology.

§ 1320.7 Definitions.

For purposes of implementing the Paperwork Reduction Act and this part, the following terms are defined as follows:

(a) "Agency" means any executive department, military department, government corporation, government controlled corporation, or other establishment in the executive branch of the government, or any independent regulatory agency, but does not include the General Accounting Office, Federal Election Commission, and governments of the District of Columbia and of the territories and possessions of the United States, and their various subdivisions, or government-owned contractor-operated facilities including laboratories engaged in national defense research and production activities.

(b) "Burden" means the total time, effort, or financial resources required to respond to a collection of information, including that to read or hear instructions; to develop, modify, construct, or assemble any materials or equipment; to conduct tests, inspections, polls, observations, or the like necessary to obtain the information; to organize the information into the requested format; to review its accuracy and the appropriateness of its manner of presentation; and to maintain, disclose, or report the information.

(1) The time and financial resources necessary to comply with a collection of information that would be incurred by persons in the normal course of their activities (e.g., in compiling and maintaining business records) will be excluded from the "burden" if the agency demonstrates that the reporting or recordkeeping activities needed to comply are usual and customary.

(2) A collection of information sponsored by a Federal agency that is also sponsored by a unit of state or local government is presumed to impose a Federal burden except to the extent the agency shows that such state or local requirement would be imposed even in the absence of a Federal requirement.

(c) "Collection of information" means the obtaining or soliciting of information by an agency from ten or more persons by means of identical questions, or identical reporting or recordkeeping requirements, whether such collection of information is mandatory, voluntary, or required to obtain a benefit. For purposes of this definition, the "obtaining or soliciting of information" includes any requirement or request for persons to obtain, maintain, retain, report, or publicly disclose information. In the Act, a "collection of information requirement" is a type of "information collection request." As used in this part, a "collection of information" refers to the act of collecting information, to the information to be collected, to a plan and/or an instrument calling for the collection of information, or any of these, as appropriate.

(1) A "collection of information" includes the use of written report forms, application forms, schedules, questionnaires, reporting or recordkeeping requirements, or other similar methods. Similar methods may include contracts, agreements, policy statements, plans, information collection requests, collection of information requirements, rules or regulations, information collection requests or collection of information requirements contained in, derived from, or authorized by such rules or regulations, planning requirements, circulars, directives, instructions, bulletins, requests for proposal or other procurement requirements, interview guides, oral communications, disclosure requirements, labeling requirements, telegraphic or telephonic requests, automated collection techniques, and standard questionnaires used to monitor compliance with agency requirements.

(2) Requirements by an agency for a person to obtain or compile information for the purpose of disclosure to members of the public or to the public at large, through posting, notification, labeling, or similar disclosure requirements, constitute the "collection of information" whenever the same requirement to obtain or compile information would be a "collection of information" if the information were directly provided to the agency. The public disclosure of information originally supplied by the Federal government to the recipient for the purpose of disclosure to the public is not included within this definition.

(3) A "collection of information" includes questions posed to agencies, instrumentalities, or employees of the United States, if the results are to be used for general statistical purposes.

(d) "Director" means the Director of OMB or his designee.

(e) "Display" means:

(1) In the case of forms, questionnaires, instructions, and other written collections of information, individually distributed to potential respondents, to print the OMB control number

(and, unless OMB determines it to be inappropriate, the expiration date) in the upper right hand corner of the front page of the collection of information;

(2) In the case of collections of information published in regulations, guidelines, and other issuances in the FEDERAL REGISTER, to publish the OMB control number in the FEDERAL REGISTER (as part of the regulatory text or as a technical amendment) and ensure that it will be included in the Code of Federal Regulations if the issuance is also included therein;

(3) In other cases, and where OMB determines that special circumstances exist, to use other means to inform potential respondents of the OMB control number (and, unless OMB determines it to be inappropriate, the expiration date).

(f) An "Education agency or institution" means any public or private agency or institution with the primary function of education.

(g) "A Federal education program" means any Federal activity with a primary purpose of offering instruction or affecting an educational agency's or institution's ability to offer instruction.

(h) "Independent regulatory agency" means the Board of Governors of the Federal Reserve System, the Commodity Futures Trading Commission, the Consumer Product Safety Commission, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Energy Regulatory Commission, the Federal Home Loan Bank Board, the Federal Maritime Commission, the Federal Trade Commission, the Interstate Commerce Commission, the Mine Enforcement Safety and Health Review Commission, the National Credit Union Administration, the National Labor Relations Board, the Nuclear Regulatory Commission, the Occupational Safety and Health Review Commission, the Postal Rate Commission, the Securities and Exchange Commission, and any other similar agency designated by statute as a Federal independent regulatory agency or commission.

(i) "General purpose statistics" are those collected chiefly for public and general government uses, without primary reference to policy or program operations of the agency collecting the information.

(j) "Information" means any statement of fact or opinion, whether in numerical, graphic, or narrative form, and whether oral or maintained on paper, magnetic tapes, or other media. "Information" does not generally include items in the following categories; however, OMB may determine that any specific item constitutes "information":

(1) Affidavits, oaths, affirmations, certifications, receipts, changes of address, consents, or acknowledgments, provided that they entail no burden other than that necessary to identify the respondent, the date, the respondent's address, and the nature of the instrument;

(2) Samples of products or of any other physical objects;

(3) Facts of opinions obtained through direct observation by an employee or agent of the sponsoring agency or through nonstandardized oral communication in connection with such direct observations;

(4) Facts or opinions submitted in response to general solicitations of comments from the public, published in the FEDERAL REGISTER or other publications, provided that no person is required to supply specific information pertaining to the commenter, other than that necessary for self-identification, as a condition to the agency's full consideration of the comment;

(5) Facts or opinions obtained initially or in follow-on requests, from individuals (including individuals in control groups) under treatment or clinical examination in connection with research on or prophylaxis to prevent a clinical disorder, direct treatment of that disorder, or the interpretation of biological analyses of body fluids, tissues, or other specimens, or the identification or classification of such specimens;

(6) A request for facts or opinions addressed to a single person;

(7) Examinations designed to test the aptitude, abilities, or knowledge of the persons tested and the collection of information for identification or

classification in connection with such examinations;

(8) Facts or opinions obtained or solicited at or in connection with public hearings or meetings;

(9) Facts or opinions obtained or solicited through nonstandardized follow-up questions designed to clarify responses to approved collections of information;

(10) Like items so designated by the Director.

(k) "Interagency reporting requirement" means any requirement that an agency report information to another agency or agencies.

(l) "Modify" means to approve in part and disapprove in part.

(m) "Penalty" means the imposition by an agency or court of a fine or other punishment; judgment for monetary damages or equitable relief; or revocation, suspension, reduction, or denial of a license, privilege, right, grant, or benefit.

(n) "Person" means an individual, partnership, association, corporation, (including operations of government-owned contractor-operated facilities), business trust, legal representative, organized group of individuals, state, territory, or local government or component thereof. Current employees of the Federal government are excluded from this definition for purposes of the collection of information within the scope of their employment. Military reservists and members of the National Guard are considered Federal employees when on active duty, and for purposes of obtaining information about duty status. Retired and other former Federal employees are included entirely within the definition of "person."

(o) "Practical utility" means the actual, not merely the theoretical or potential, usefulness of information to an agency, taking into account its accuracy, adequacy, and reliability, and the agency's ability to process the information in a useful and timely fashion. In determining whether information will have "practical utility," OMB will take into account whether the agency demonstrates actual timely use for the information either to carry out its functions or to make it available to the public, either directly or by means of a public disclosure or labeling requirement, for the use of persons who have an interest in entities or transactions over which the agency has jurisdiction. In the case of general purpose statistics or recordkeeping requirements, "practical utility" means that actual uses can be demonstrated.

(p) "Recordkeeping requirement" means a requirement imposed by an agency on persons to maintain specified records and includes requirements that information be maintained or retained by persons but not necessarily provided to an agency.

(q) "Reporting requirement" means a requirement imposed by an agency on persons to provide information to another person or to the agency. Reporting requirements may implicitly or explicitly include related recordkeeping requirements.

(r) "Sponsor." A Federal agency is considered to "sponsor" the collection of information if the agency collects the information, causes another agency to collect the information, contracts or enters into a cooperative agreement with a person to collect the information, or requires a person to provide information to another person. A collection of information undertaken by a recipient of a Federal grant is considered to be "sponsored" by an agency only if:

(1) The recipient of a grant is collecting information at the specific request of the agency; or

(2) The terms and conditions of the grant require specific approval by the agency of the collection of information or the collection procedures.

(s) "Ten or more persons" refers to the persons to whom a collection of information is addressed by the agency within any 12-month period, and to any independent entities to which the initial addressee may reasonably be expected to transmit the collection of information during that period, including independent state or local entities and separately incorporated subsidiaries or affiliates, but not including employees of the respondent within the scope of their employment, or contractors engaged for the purpose of complying with the collection of information.

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(1) Any recordkeeping or reporting requirement contained in a rule of general applicability is deemed to involve ten or more persons.

(2) Any collection of information addressed to all or a substantial majority of an industry is presumed to involve ten or more persons.

§ 1320.8 Agency head and senior official responsibilities.

(a) Except as provided in paragraph (b) of this section, each agency head shall designate a Senior Official to carry out the responsibilities of the agency under the Act.

(1) The Senior Official shall report directly to the head of the agency and shall have the authority, subject to that of the agency head, to carry out the responsibilities of the agency under the Act and this part.

(2) The Senior Official shall independently assess all collections of information to ensure that they meet the criteria specified in § 1320.4(b) and that the agency conducts no collection of information that does not display a currently valid OMB control number.

(b) An agency head may retain full undelegated review authority for any component of the agency which by statute is required to be independent of any agency official below the agency head. For each component for which responsibility under the Act is not delegated to the Senior Official, the agency head shall be responsible for the performance of those functions.

(c) Upon request of the Director, the head or the Senior Official of each agency (other than an independent regulatory agency) shall make its services, personnel, and facilities available to OMB for the performance of Paperwork Reduction Act functions, unless such head or Senior Official determines in writing that the provision of such resources is impracticable.

§ 1320.9 Delegation of approval authority.

(a) The Director may, after complying with the notice and comment procedures of 5 U.S.C. Chapter 5, delegate OMB review of some or all of an agency's collections of information to the Senior Official, or to the agency head with respect to those components of the agency for which he has not delegated authority.

(b) No delegation of review authority shall be made unless the agency demonstrates to OMB that the Senior Official or agency head to whom the authority would be delegated:

(1) Is sufficiently independent of program responsibility to evaluate fairly whether proposed collections of information should be approved, and

(2) Has sufficient resources to carry out this responsibility effectively.

(c) OMB may limit, condition, or rescind, in whole or in part, at any time, such delegations of authority, and reserves the right to review any individual collection of information, or part thereof, sponsored by an agency, at any time.

(d) Subject to the provisions of this part, and in accord with the terms and conditions of each delegation as specified in Appendix A to this part, the Director delegates review and approval authority to the following agencies:

(1) Board of Governors of the Federal Reserve System.

§ 1320.10 Information collection budget.

Each agency's Senior Official, or agency head in the case of any agency for which the agency head has not delegated responsibility under the Act for any component of the agency to the Senior Official, shall develop and submit to OMB, in such form and in accordance with such procedures as OMB may prescribe, an annual comprehensive budget for all collections of information from the public to be conducted or sponsored by the agency in the succeeding twelve months. If during the course of such year, the agency proposes a collection of information not included in the annual budget, it shall, in accordance with such instructions as OMB may provide, either make offsetting reductions in other items in the budget or obtain supplemental authorization for the additional collection. For good cause, and where it is possible to meet its statutory responsibilities by other means, OMB may exempt any agency from this requirement.

§ 1320.11 Agency submissions of collections of information.

(a) Agency submissions of collections of information for OMB review may be made only by the agency head or Senior Official, or their designee. Submissions shall be made in accordance with such procedures and in such form as the Director may prescribe. Submissions shall provide sufficient information to permit consideration of the criteria set out in § 1320.4 (b) and (c), shall include an estimate of burden, calculated in a manner prescribed by OMB, shall identify any significant burdens placed on a substantial number of small businesses or other small entities, and shall contain such additional supporting material as the Director may request.

(b) Agencies shall provide copies of the material submitted to OMB for review promptly upon request by any person.

(c) OMB shall review all agency submissions in accordance with the standards set forth in § 1320.4 (b) and (c).

(d) In determining whether to approve, disapprove, modify, review, initiate proposals for changes in or stay the effectiveness of its approval of, any collection of information, OMB shall consider any public comments received, and may provide the agency and interested persons additional opportunities to be heard or to submit statements in writing. Any such determination and explanation thereof shall be publicly available.

(e) Agencies shall submit collections of information contained in proposed rules published for public comment in the FEDERAL REGISTER in accordance with the requirements set forth in § 1320.13. Agencies shall submit collections of information contained in current regulations that were published as final rules in the FEDERAL REGISTER in accordance with the requirements set forth in § 1320.14. Agencies shall submit collections of information other than those contained in proposed rules published for public comment in the FEDERAL REGISTER or in current regulations that were published as final rules in the FEDERAL REGISTER, in accordance with the requirements set forth in § 2320.12. Special rules for clearance and inventory of collections of information prescribed by an agency, but collected by another agency, are set forth in § 1320.16. Special rules for emergency processing of collections of information are set forth in § 1320.18.

(f) Prior to the expiration date assigned to a collection of information, after consultation with the agency, OMB may decide to review the collection of information, and shall so notify the agency. Such decisions will be made only when relevant circumstances have changed or the burden estimates provided by the agency at the time of the initial submission were materially in error. Upon such notification, the agency shall submit the collection of information for review under the procedures outlined in § 1320.12 or § 1320.14, as appropriate. The agency may continue to sponsor the collection of information while the submission is pending. For good cause, after consultation with the agency, OMB may stay the effectiveness of its approval of any collection of information not specifically required by agency rule, whereupon the agency shall cease sponsoring such collection of information while the submission is pending, and shall publish a notice in the FEDERAL REGISTER to that effect.

(g) Whenever the persons to whom a collection of information is addressed are primarily educational agencies or institutions or whenever the purpose of such activities is primarily to request information needed for the management or formulation of policy related to Federal education programs, or research or evaluation studies related to implementation of Federal education programs, the collection of information shall be submitted to OMB in accordance with the procedures outlined in this Part. Such request or requirement will be reviewed by the Federal Education Data Acquisition Council (FEDAC), or organizational unit fulfilling the same statutory function within the Department of Education, prior to approval or disapproval by OMB. Collections of information addressed to educational agencies or institutions and submitted to the Secretary of Education under the provisions of 20 U.S.C. 1221-1223 shall be submitted by the Secretary of Education to

OMB for approval in accordance with procedures contained in this Part, in time to receive OMB approval and to be announced publicly by the agency by the Feburary 15 preceding the school year in which the information is to be collected.

(h) No substantive or material modification may be made by an agency in a collection of information after it has been assigned an OMB control number unless the modification has been submitted to OMB for review and approval pursuant to the procedures outlined in this part.

(i) OMB will reconsider its disapproval of a collection of information upon the written request of an agency head or Senior Official only if the sponsoring agency is able to provide significant new or additional information relevant to the original decision.

(j) For purposes of time limits for OMB review of collections of information, any submission received by OMB after 12:00 noon will be deemed to have been received on the following business day.

§ 1320.12 Clearance of collections of information.

Agencies shall submit all collections of information, other than those contained either in proposed rules published for public comment in the FEDERAL REGISTER or in current rules that were published as final rules in the FEDERAL REGISTER, in accordance with the following requirements:

(a) On or before the day of submission to OMB, the agency shall, in accordance with the requirements set forth in § 1320.15, forward a notice to the FEDERAL REGISTER stating that OMB approval is being sought. The notice shall direct requests for information, including copies of the proposed collection of information and supporting documentation, to the agency, and shall direct comments to the Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for [name of agency]. A copy of the notice submitted to the FEDERAL REGISTER, together with the date of expected publication, shall be included in the agency's submission to OMB.

(b) Within 60 days of its receipt of a proposed collection of information, OMB shall notify the agency involved of its decision to approve, modify, or disapprove the collection of information and shall make such decision publicly available. OMB may extend this 60-day period for an additional 30 days upon notice to the agency. Upon approval of a collection of information, OMB shall assign a control number and an expiration date. OMB shall not approve any collection of information for a period longer than three years.

(c) If OMB fails to notify the agency of its approval, disapproval, or extension of review within the 60-day period (or 90-day period if notice of an extended review has been given), the agency may request, and OMB shall assign without further delay, a control number that shall be valid for not more than one year.

(d) A collection of information may not become effective until the agency has displayed a valid OMB control number (and, unless OMB determines it to be inappropriate, an expiration date).

§ 1320.13 Clearance of collections of information in proposed rules.

Agencies shall submit collections of information contained in proposed rules published for public comment in the FEDERAL REGISTER in accordance with the following requirements:

(a) The agency shall include, in accordance with the requirements set forth in § 1320.15, in the preamble to the Notice of Proposed Rulemaking a statement that the collections of information contained in the rule, and identified as such, have been submitted to OMB for review under section 3504(h) of the Act. The statement shall direct comments to the Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for [name of agency].

(b) All such submissions shall be made to OMB not later than the day on which the Notice of Proposed Rulemaking is published in the FEDERAL REGISTER, in such form and in accordance with such procedures as the Director may direct. Such submissions shall include a copy of the proposed regulation and preamble.

(c) Within 60 days of publication of the proposed rule, OMB may file public comments on collection of information provisions. Such comments shall be in the form of an OMB Notice of Action, which shall be sent to the Senior Official or agency head, or their designee, and which shall be made a part of the agency's rulemaking record.

(d) If an agency submission is not in compliance with paragraph (b) of this section, OMB may disapprove the collection of information in the proposed rule within 60 days of receipt of the submission. If an agency fails to submit a collection of information subject to this section, OMB may disapprove it at any time.

(e) When the final rule is published in the FEDERAL REGISTER, the agency shall explain how the final rule responds to any comments received from OMB or the public. The agency shall include an identification and explanation of any modifications made in the rule, or explain why it rejected the comments. If requested by OMB, the agency shall include OMB's comments in the preamble to the final rule.

(f) If OMB has not filed public comments pursuant to § 1320.13(c), or has approved the collection of information contained in a rule before the final rule is published in the FEDERAL REGISTER, OMB may assign a control number prior to publication of the final rule, and the agency may display the number in its publication of the final rule.

(g) On or before the date of publication of the final rule, the agency shall submit the final rule to OMB, unless it has been approved pursuant to § 1320.13(f) (and not substantively or materially modified by the agency after approval). Not later than 60 days after publication OMB shall approve, modify, or disapprove the collection of information contained in the final rule. Any such disapproval may be based on one or more of the following reasons, as determined by OMB:

(1) The agency failed to comply with paragraph (b) of this section;

(2) The agency had substantially modified the collection of information contained in the final rule from that contained in the proposed rule, without providing OMB with notice of the change of sufficient information to make a determination concerning the modified collection of information at least 60 days before publication of the final rule; or

(3) In cases where OMB had filed public comments pursuant to paragraph (c) of this section, the agency's response to such comments was unreasonable, and the collection of information is unnecessary for the proper performance of the agency's functions.

(h) After making such decision to approve, modify, or disapprove a collection of information, OMB shall so notify the agency. If OMB approves the collection of information or if it has not acted upon the submission within the time limits of this section, OMB shall assign a control number. If OMB disapproves the collection of information, it shall make the reasons for its decision publicly available.

(i) OMB shall not approve any collection of information for a period longer than three years. Approval of any collection of information submitted under this section will be for the full three-year period, unless the Director determines that there are special circumstances requiring approval for a shorter period.

(j) After receipt of notification of OMB's approval, disapproval, or failure to act, and prior to the effective date of the rule, the agency shall publish a notice in the FEDERAL REGISTER to inform the public of OMB's decision. If OMB has approved or failed to act upon the collection of information, the agency shall include the OMB control number in such notice. A collection of information may not become effective until OMB has assigned a control number, and such number is displayed.

§ 1320.14 Clearance of collections of information in current rules.

Agencies shall submit collections of information contained in current regulations that were published as final rules in the FEDERAL REGISTER in accordance with the following procedures:

(a) In order to prevent the control number and OMB approval for a collection of information subject to this section from expiring without the agency first having complied with all applicable procedures attendant to the amendment or repeal of the rule containing the collection of information, agencies shall submit to OMB all previously approved collections of information subject to this section not later than 90 days before the expiration date of the OMB control number assigned to the collection.

(b) On or before the day of submission to OMB, the agency shall, in accordance with the requirements set forth in § 1320.15, forward a notice to the FEDERAL REGISTER stating that OMB review is being sought. The notice shall direct requests for information, including copies of the collection of information and supporting documentation, to the agency, and shall direct comments to the Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for [name of agency]. A copy of the notice submitted to the FEDERAL REGISTER, together with the date of expected publication, shall be included in the agency's submission to OMB.

(c) Within 60 days of its receipt of a collection of information submission, OMB shall notify the agency involved of its decision whether to approve or to initiate proposals for change in the collection and shall make such decision publicly available. OMB may extend this 60-day period for an additional 30 days upon notice to the agency. Upon approval of a collection of information, OMB shall assign a control number and an expiration date.

(d) OMB shall not approve any collection of information for a period longer than three years. Approval of any collection of information submitted under this section will be for the full three year period, unless the Director determines that there are special circumstances requiring approval for a shorter period.

(e) If OMB fails to notify the agency of its approval, decision to initiate proposals for change, or extension of review within the 60-day period (or 90-day period if notice of an extended review has been given), the agency may request, and OMB shall assign without further delay, a control number that shall be valid for not more than one year. Upon assignment of a control number by OMB, the agency shall display such number in accordance with § 1320.7(e)(2).

(f) If OMB has notified the agency of a decision to initiate proposals for change in the collection of information, it shall extend the existing approval of the collection for the duration of the period required for consideration of proposed changes, including that required for OMB approval or disapproval of the collection of information under § 1320.12(b) or § 1320.13(g), as appropriate. In the case of a collection of information not previously approved, a control number shall be granted for such period. The agency shall publish a notice on the agency's next practicable publication date in the FEDERAL REGISTER to inform the public that OMB has initiated proposals for change in the collection, and has granted or extended its approval of the collection of information.

(g) Thereafter, the agency shall, within a reasonable period of time not to exceed 120 days, undertake such procedures as are necessary in compliance with the Administrative Procedure Act and other applicable law to amend or rescind the collection of information, and shall notify the public through the FEDERAL REGISTER. Such notice shall identify the proposed changes in the collections of information and shall solicit public comment on retention, modification, or rescission of such collections of information. If the agency employs notice and comment rulemaking procedures for amendment or rescission of the collection of information, publication of the above in the FEDERAL REGISTER and submission to OMB shall initiate OMB clearance procedures under section 3504(h) of the Act and § 1320.13. If the agency does not employ notice and comment rulemaking procedures for amendment or rescission of the collection of information, publication of such notice and submission to OMB shall initiate OMB clearance procedures under section 3507 of the Act and § 1320.12. All procedures shall be completed within a reasonable period of time to be determined by OMB in consultation with the agency.

(h) OMB may disapprove, in whole or in part, any collection of information subject to the procedures of this section, if the agency:

(1) Has refused within a reasonable time to comply with an OMB directive to submit the collection of information for review;

(2) Has refused within a reasonable time to initiate procedures to change the collection of information; or

(3) Has refused within a reasonable time to publish a final rule continuing the collection of information, with such changes as may be appropriate, or otherwise complete the procedures for amendment or rescission of the collection of information.

(i) Upon disapproval by OMB of a collection of information subject to this section, the OMB control number assigned to such collection shall immediately expire, and no agency shall conduct or sponsor such collection of information. Any such disapproval shall constitute disapproval of the collection of information contained in the Notice of Proposed Rulemaking or other submissions, and also of the preexisting information collection instruments directed at the same collection of information and therefore constituting essentially the same collection of information.

§ 1320.15 Federal Register notice of OMB review.

(a) In each notice prescribed by §§ 1320.12(a) and 1320.14(b), and the statement prescribed by § 1320.13(a), agencies shall set forth, at a minimum:

(1) The title for the collection of information;

(2) A brief description of the agency's need for the information to be collected, including the use to which it is planned to be put;

(3) A description of the likely respondents; and

(4) An estimate of the total annual reporting and recordkeeping burden that will result from each collection of information. This total burden for each collection of information shall also be disaggregated and set forth in terms of the estimated average burden hours per response, the proposed frequency of response, and the estimated number of likely respondents.

(b)(1) If, at the time of submittal of a collection of information for OMB review in accordance with the requirements set forth in § 1320.12 or § 1320.14, an agency plans to request, or has requested OMB to conduct its review on an expedited schedule (a review faster than 60 days from the date of receipt by OMB), the agency shall publish as part of this FEDERAL REGISTER notice the time period within which it is requesting OMB to approve or disapprove the collection of information, and a copy of the collection of information, together with any related instructions, for which OMB approval is being sought.

(2) If advance publication of the collection of information and any related instructions would defeat the purpose of the collection of information, OMB may, in consultation with the agency, exempt from the requirements of this subsection specific collections of information or categories thereof.

§ 1320.16 Collections of information prescribed by another agency.

(a) Any collection of information prescribed by an agency and to be adopted as a Standard or Optional Form after approval by the General Services Administration (GSA) shall be submitted to OMB for approval through GSA in accordance with such procedures and in such form as the Director may prescribe.

(1) Standard and Optional Forms used for the collection of information must be approved by OMB and assigned a currently valid control number before they can be used.

(2) GSA, with the assistance of the agencies using the forms, shall submit annually to OMB a list of all Standard and Optional Forms in use during that year for the collection of information from the public, stating which agencies use these forms, the number of each form used by each agency, and an estimate of the burden required to complete each form. Burden estimates developed by GSA will be counted as burden imposed by each agency in proportion to the use of the information.

(b) Any other collections of information prescribed by an agency but collected by another agency or agencies shall be submitted to OMB for approval by the agency that prescribes the collection, in accordance with such procedures and in such form as the Director may prescribe. With the assistance of the agencies collecting the information, the agency making the submission shall inform OMB of which agencies collect the information and an estimate of the burden of the collection of information. Burden estimates developed by the submitting agency will be counted as burden imposed by each agency in proportion to their use of the information.

(c) In other respects, collections of information under this section shall be treated under the standards and procedures of §§ 1320.11 through 1320.15, and 1320.21, as appropriate.

§ 1320.17 Interagency reporting.

In accordance with authorities in the Act, the Federal Records Act, and the Budget and Accounting Procedures Act, as amended, the General Services Administration (GSA) is directed to issue regulations or requirements for the management of interagency reporting and provide for the approval and clearance of interagency reporting, whether mandatory or voluntary. Upon request, GSA shall report to the Director on the status of interagency reporting. Judicial branch requirements contained in court orders or decrees, and OMB and other Executive Office of the President requirements shall be exempt from the provisions of this section.

§ 1320.18 Emergency and expedited processing.

An agency head or the Senior Official may request emergency processing of submissions of collections of information.

(a) Any such request shall be accompanied by a written determination that the collection of information is essential to the mission of the agency, and that public harm will result if normal clearance procedures are followed, or that an unanticipated event has occurred which will prevent or disrupt the collection of information or cause a statutory or judicial deadline to be missed if normal procedures are followed.

(b) The agency shall state the time period within which OMB should approve or disapprove the collection of information.

(c) The agency shall submit information indicating that it has taken all practicable steps to consult with interested agencies and members of the public in order to minimize the burden of the collection of information.

(d) The agency shall set forth in the FEDERAL REGISTER notice prescribed by § 1320.15 a statement that it is requesting emergency processing, and the time period stated under § 1320.18(b).

(e) OMB shall approve or disapprove each such submission within the time period stated under § 1320.18(b), provided such time period is consistent with the purposes of the Act.

(f) If OMB approves the collection of information, it shall assign a control number valid for a maximum of 90 days after receipt of the agency submission.

(g) Upon request by an agency, OMB may agree to act on a collection of information submission on an expedited schedule, even though such submission may not qualify for emergency processing under this section.

§ 1320.19 Public access.

(a) In order to enable the public to participate in and provide comments during the clearance process, OMB will ordinarily make its paperwork docket files available for public inspection during normal business hours. Notwithstanding other provisions of this rule, requirements to publish public notices or to provide materials to the public may be modified or waived by the Director to the extent that public participation in the approval process would defeat the purpose of the collection of information; jeopardize the confidentiality of proprietary, trade secret, or other confidential information; violate State or Federal law; or substantially interfere with an agency's ability to perform its statutory obligations. Provisions of this paragraph guaranteeing public availability of comments on agency collections of information will not be waived or modified.

(b) Agencies conducting or sponsoring a collection of information shall take reasonable steps to inform potential respondents of the identity of the Federal agency sponsoring any collection of information, why the information is being collected, how it is to be used, the average burden hours per response, whether responses to the request are voluntary, required to obtain or retain a benefit (citing authority), or mandatory (citing authority), and the nature and extent of confidentiality to be provided, if any (citing authority).

§ 1320.20 Independent regulatory agency override authority.

An independent regulatory agency may override OMB's disapproval or stay of effectiveness of approval of a collection of information by majority vote of its members or commissioners. The agency shall certify any such override to the Director, and shall explain in writing its reasons for exercising the override authority. OMB shall promptly assign an OMB control number, valid for the length of time requested by the agency, up to three years, to any collection of information as to which this authority is exercised. No override shall become effective until the independent regulatory agency has displayed the OMB control number.

§ 1320.21 Agency disclosure of estimated burden.

(a)(1) Agencies shall disclose on each collection of information, as close to the current OMB control number as practicable, the agency estimate of the average burden hours per response.

(2) Agencies shall include with this estimate of burden a request that the public direct to the agency and the Office of Information and Regulatory Affairs any comments concerning the accuracy of this burden estimate and any suggestions for reducing this burden.

(b) If it is not practicable to place the burden estimate and request for comments on the front page, or otherwise at the beginning of the collection of information or in the regulatory text, the agency may place the burden estimate and request for comments at the beginning of the instructions that accompany the collection of information, or at the beginning of the preamble of a proposed or final rule that contains the collection of information. If an agency develops or relies upon forms or other instruments in order to implement a collection of information in a proposed or final rule, the agency shall place the applicable burden estimate and the request for comments on both the rule and the forms or other information collection instruments.

(c) An agency need place the burden estimate and request for comments only on copies of the collection of information, or on its instructions, printed or otherwise reproduced (or newly communicated) after July 1, 1988.

(d) If special circumstances exist, OMB may, in consultation with the agency, exempt from the requirements of this section specific collections of information or categories thereof.

§ 1320.22 Other authority.

(a) The Director shall determine whether any collection of information or other matter is within the scope of the Act, or of this part.

(b) In appropriate cases, after consultation with the agency, the Director may initiate a rulemaking proceeding to determine whether an agency's collection of information is consistent with statutory standards. Such proceedings shall be in accordance with informal rulemaking procedures under 5 U.S.C. Chapter 5.

(c) Each agency is responsible for complying with the information policies, principles, standards, and guidelines prescribed by the Director.

(d) To the extent permitted by law, the Director may waive any requirements contained in this part.

(e) Nothing in this part shall be interpreted to limit the authority of the Director under the Paperwork Reduction Act of 1980, the Paperwork Reduction Reauthorization Act of 1986, or any other law. Nothing in this part, the Paperwork Reduction Act of 1980, or the Paperwork Reduction Reauthorization Act of 1986 shall be interpreted as increasing or decreasing the authority of OMB with respect to the substantive policies and programs of the agencies.

APPENDIX A TO PART 1320—AGENCIES WITH DELEGATED REVIEW AND APPROVAL AUTHORITY

1. The Board of Governors of the Federal Reserve System.

(a) Authority to review and approve collection of information requests, collection of information requirements, and collections of information in current rules is delegated to the Board of Governors of the Federal Reserve System.

(1) This delegation does not include review and approval authority over any new collection of information or any modification to an existing collection of information that:

(i) Is proposed to be collected as a result of a requirement or other mandate of the Federal Financial Institutions Examination Council, or other Federal executive branch entities with authority to require the Board to conduct or sponsor a collection of information.

(ii) Is objected to by another Federal agency on the grounds that that agency requires information currently collected by the Board, that the currently collected information is being deleted from the collection, and the deletion will have a serious adverse impact on the agency's program, provided that such objection is certified to OMB by the head of the Federal agency involved, with a copy to the Board, before the end of the comment period specified by the Board on the FEDERAL REGISTER notices specified in (3)(i) of this appendix.

(iii) Would cause the burden of the information collections conducted or sponsored by the Board to exceed by the end of the fiscal year the Information Collection Budget allowance provided to the Board by OMB for the fiscal year-end.

(2) The Board may ask that OMB review and approve collections of information covered by this delegation.

(3) In exercising delegated authority, the Board will:

(i) Provide the public, to the extent possible and appropriate, with reasonable opportunity to comment on collections of information under review prior to taking final action approving the collection. Reasonable opportunity for public comment will include publishing a notice in the FEDERAL REGISTER informing the public of the proposed collection of information, notifying the public of the availability of copies of the "clearance package," and providing the public with the opportunity to comment. Such FEDERAL REGISTER notices shall also advise the public that they may also send a copy of their comments to the OMB/OIRA Desk Officer for the Federal Reserve Board.

(A) Should the Board determine that a new collection of information or a change in an existing collection must be instituted quickly and that public participation in the approval process would defeat the purpose of the collection or substantially interfere with the Board's ability to perform its statutory obligation, the Board may approve of the collection of information without providing opportunity for public comment. At the earliest practical date after approving the collection of information, the Board will publish a FEDERAL REGISTER notice informing the public of its approval of the collection of information and indicating why immediate action was necessary.

(B) In such cases, before taking final action to reauthorize the collection of information for an additional period, the Board will take into account any comments received after the institution of the collection.

(ii) Provide the OMB/OIRA Desk Officer for the Federal Reserve Board with a copy of the Board's FEDERAL REGISTER notice not later than the day the Board files the notice with the Office of the Federal Register.

(iii) Assure that approved collections of information are reviewed not less frequently than once every three years, and that such reviews are normally conducted before the expiration date of the prior approval. Where the review has not been completed prior to the expiration date, the Board may extend the report, for up to three months, without public notice in order to complete the review and consequent revisions, if any. There may also be other circumstances in which the Board determines that a three-month extension without public notice is appropriate.

(iv) Take every reasonable step to ensure that the collection of information conforms to the requirements of 5 CFR 1320.4(b). In determining whether to approve a collection of information, the Board will consider all comments received from the public and other agencies. The Board will not approve a collection of information that it determines does not satisfy the guidelines set forth in 5 CFR 1320.6, unless it determines that departure from these guidelines is necessary to satisfy statutory requirements or other substantial need.

(v) Assure that each approved collection of information displays an OMB control number and that all collections of information, except those contained in regulations, display the expiration date of the approval.

(vi) Assure that each approved collection of information, together with a completed SF83, a supporting statement, a copy of each comment received from the public and other agencies in response to the Board's Federal Register notice or a summary of these comments, and a certification that the Board has approved of the collection of information in accordance with the provisions of this delegation is transmitted to OMB for incorporation into OMB's public docket files. Such transmittal shall be made as soon as practical after the Board has taken final action approving the collection. However, no collection of information may be instituted until the Board receives written or oral notification from OMB or OMB staff that the transmittal has been received.

(b) OMB will:

(1) Provide the Board in advance with a block of control numbers which the Board will assign in sequential order to, and display on, new collections of information.

(2) Provide a written notice of action to the Board indicating that Board approvals of collections of information have been received by OMB and incorporated into OMB's public docket files and inventory of currently approved collections of information.

(3) Review any collection of information referred by the Board in accordance with the provisions of section 1(a)(2) of this appendix.

(c) OMB may review the Board's paperwork review process under the delegation. The Board will cooperate in carrying out such a review. The Board will respond to any recommendations resulting from such review and, if it finds the recommendations to be appropriate, will either accept the recommendations or propose an alternative approach to achieve the intended purpose.

(d) This delegation may, as provided by 5 CFR 1320.9(c), be limited, conditioned, or rescinded, in whole or in part at any time. OMB will exercise this authority only in unusual circumstances and, in those rare instances, will do so, subject to the provisions of 5 CFR 1320.11(f), prior to the expiration of the time period set for public comment in the Board's Federal Register notices and generally only if:

(1) Prior to the commencement of a Board review (e.g., during the ICB review), OMB has notified the Board that it intends to review a specific new proposal for the collection of information or the continued use (with or without modification) of an existing collection;

(2) There is substantial public objection to a proposed information collection; or

(3) OMB determines that a substantially inadequate and inappropriate lead time has been provided between the final announcement date of the proposed requirement and the first date when the information is to be submitted or disclosed. When OMB exercises this authority it will consider that the period of its review began the day that OMB received the Federal Register notice provided for in section 1(a)(3)(i) of this appendix.

(e) Where OMB conducts a review of a Board information collection proposal under section 1(a)(1), 1(a)(2), or 1(d) of this appendix, the provisions of 5 CFR 1320.18 and 5 CFR 1320.20 continue to apply.

(31 U.S.C. sec. 18a and 44 U.S.C. Chs. 21, 25, 27, 29, 31, 35)

Privacy Act

Citations:

5 U.S.C. §552a, enacted December 31, 1974 by Pub. L. No. 93-579, §3, 88 Stat. 1897; significantly amended by Pub. L. No. 94-183, §2(2), 89 Stat. 1057, December 31, 1975; Pub. L. No. 97-365, §2, 96 Stat. 1749, October 25, 1982; Pub. L. No. 97-375, title II, §201(a), (b), 96 Stat. 1821, December 21, 1982; Pub. L. No. 97-452, §2(a)(1), 96 Stat. 2478, January 12, 1983; Pub. L. No. 98-477, §2(c), 98 Stat. 2211, October 15, 1984; Pub. L. No. 98-497, title I, §107(g), 98 Stat. 2292, October 19, 1984; Pub. L. No. 100-503, §§2-8, 102 Stat. 2507-2514), October 18, 1988; and Pub. L. No. 101-508, title VII, §7201(b)(1), 104 Stat. 1388-(3), November 5, 1990.

Lead Agency:

Office of Management and Budget, Office of Information and Regulatory Affairs, Old Executive Office Building, Washington, DC 20503 (202) 395-3964.

Overview:

The Privacy Act of 1974 represents congressional response to concerns about government uses of information collected about private individuals. The Act gives individuals greater control over gathering, dissemination, and ensuring accuracy of information collected about themselves by agencies. (*Miller v. U.S.*, 630 F. Supp. 347 (E.D.N.Y. 1986)). The main purpose of the Act is to forbid disclosure unless it is required by the Freedom of Information Act. (*Lovell v. Alderete*, 630 F.2d 428 (5th Cir.

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1980)). To protect individual privacy, the Act constrains executive branch recordkeeping, defines the individual's right to access certain records, limits agency disclosure of records containing an individual's private information, establishes safeguards to protect records concerning individuals, and provides remedies for agency violation of the Act's provisions.

Scope. The Act covers records maintained by executive branch agencies and certain government-controlled corporations on individuals. It does not apply to the legislative branch, national banks (*U.S. v. Miller*, 643 F.2d 713 (10th Cir. 1981)), or Amtrak (*Ehm v. National R.R. Passenger Corp.*, 732 F.2d 1250 (5th Cir. 1984), *cert. denied*, 469 U.S. 982 (1984)). A record is a collection or grouping of information about an individual that, for example, may include educational, financial, or biographical information together with personal identifiers such as names, photos, numbers, or fingerprints. (5 U.S.C. §552a(a)(4)). It does not apply to all government records and documents that may contain an individual's name or other private information. For example, it does not include private notes of a supervisor if such notes are not used by the agency to make decisions (*Johnston v. Horne*, 875 F.2d 1415 (9th Cir. 1989)), but such notes may become subject to the Act if they become part of an agency's decision. (*Chapman v. NASA*, 682 F.2d 526 (5th Cir. 1982), *cert. denied,* 469 U.S. 1038 (1984)). It also does not apply to information in documents obtained from independent sources of information, even though identical information may be in an agency's system of records (*Thomas v. DOE*, 719 F.2d 342 (10th Cir. 1983)).

The Act focuses on "systems of records" established, maintained, or controlled by an agency. A "system of records" is a group of any records where individual names or other individual identifiers can be used to retrieve the information (5 U.S.C. §552a(a)(5)). Agencies may maintain records covered by the Act only when they are relevant and necessary to accomplish the agency's purpose (5 U.S.C. §552(e)(1)). The Act applies to agencies as defined in FOIA, including Cabinet level departments, independent regulatory agencies, military departments, and government corporations (5 U.S.C. §552a(a)(1)).

Access to Records. Where the agency is authorized to keep records covered by the Act, an individual has a right of access to records concerning him or her. This is a central protection of the Act for individuals. The individual has a right to:

- Copy any or all of the record (§552a(d)(1));

- Request amendment of the record (§552a(d)(2)) and to file a concise statement of disagreement if the agency refuses to amend the record that will be provided to all persons to whom the record is disclosed (§552a(d)(4));

- Request an accounting from the agency concerning the date, nature, and purpose of each disclosure of the record (§552a(c)).

The individual has an absolute right to access and need not provide any reason for seeking access (*FTC v. Shaffner*, 626 F.2d 32 (7th Cir. 1980)).

Agency Requirements. For each system of records an agency maintains, it must:

- Publish in the Federal Register the name and location of the system; the categories of individuals contained in the system; the routine use of the records; agency policies concerning the records including storage, retrieval, access, retention and disposal; the person, including title and address, responsible for the system; the method used to notify individuals how to gain access to records about themselves; and the sources or records in the system. Any new use of the system must be noticed for comment 30 days prior to implementing the new use. Exempt systems must also be noticed ((See, e.g., §552a(b)(3), (e)(4) and (e)(11)).

- Maintain records in the system accurately, completely, and timely to ensure fairness to the individuals (§552a(e)(5));

- Establish rules and training for persons designing, developing, operating, or maintaining the system to ensure compliance with the Act and the agency's implementing policies (§552a(e)(9));

- Establish safeguards for the protection of records (§552a(e) (10));
- Inform government contractors of their responsibilities under the Act (§552a(m)).

When the agency collects information that "may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs," the Act requires the information to be collected, to the "greatest extent practicable," directly from the affected individual (§552a(e)(2)). When requesting such information from individuals, the agency must disclose: (1) the authority under which collection is authorized; (2) the principal purposes for which the information is needed; (3) the routine use of the information; and (4) consequences, if any, of not providing the information (§552a(e)(3)).

The Act mandates that information maintained in agency records be as relevant and as necessary as possible to accomplish the agency's purpose. It must also ensure fairness to the individual. In *DOE v. U.S.*, 821 F.2d 694 (D.C. Cir. 1987), the court sitting *en banc* held that an agency may leave information an individual considers damaging, together with the individual's explanation or disagreement with the accuracy of the information, in its records without making an explanation under section 552a(d)(4), concerning why it chose not to expunge the information as requested. The court found that the agency made a reasonable effort to determine the accuracy of the information and that an adjudication of the disputed facts was not necessary for the agency's purposes. The court said that in some cases, fairness may require a record to contain both versions of disputed fact. Strong dissents argued that fairness to the individual was the overriding concern under the Act, and that the harm to the individual is the same if disputed facts are unverified or substantiated.

Agencies are prohibited from maintaining records describing how an individual exercises First Amendment rights, unless such records are authorized by statute or are pertinent to and within the scope of authorized law enforcement activity (§552a(e)(7)). Such records are subject to the Act even if not kept in "a system of records." *Clarkson v. IRS*, 678 F.2d 1368 at 1373-77 (11th Cir. 1982), *cert. denied*, 481 U.S. 1031. Cf. *Pototsky v. Dept of Navy*, 717 F. Supp. 20 (D. Mass. 1989). OMB guidelines call for the broadest reasonable interpretation of the prohibition (see Appendix).

Exemptions from Access. The Act provides general (§552a(j)) and specific (§552a(k)) exemptions. These are exemptions allowing an agency to deny access to the record by the individual to whom the record pertains. The two types are different in nature and consequences and are discretionary on the agency's part. To be effective, the agency must first determine that a record or system of records meets the criteria for exemption under the Act and then publish the exemption as a rule under the APA's notice and comment provisions. Failure to set out reasons demonstrating that the exemption meets the requirements of the Act may leave the records subject to the Act. *Exner v. FBI*, 612 F.2d 1202 (9th Cir. 1980). The exemptions do not authorize the agency to use the record in a manner other than the manner originally set out in the Federal Register establishing the system of records. *DOE v. Naval Air Station,* 768 F.2d 1229 (11th Cir. 1985).

A general exemption denies access by an affected individual under virtually all the Act's provisions and is available for records maintained by the Central Intelligence Agency or by an agency whose principal functions are criminal law enforcement. The general exemption may not be used to exempt records compiled for a noncriminal or administrative purpose even if they are also a part of a system of records maintained by an agency qualified to assert the exemption. *Vymetalik v. FBI*, 785 F.2d 1090 (D.C. Cir. 1986).

The specific exemptions (§552a(k)(1)-(7)) are available to any agency if the head of the agency promulgates rules pursuant to the notice-and-comment provisions of the APA (5 U.S.C. §553). The specific exemption is from a particular provision of the Act. The seven exemptions allowed are:

- FOIA (b)(1) exemptions (matters to be kept secret in the interest of national defense or foreign policy and properly classified by executive order);

- Investigatory material compiled for law enforcement purposes that does not fall within the general exemption;

- Material maintained to provide protective service to the President or pursuant to 18 U.S.C. §3056;

- Statistical records required by statute;

- Investigatory records relating to civilian or military employment or federal contracts obtained under a promise of confidentiality;
- Testing and examination material related to federal employment;
- Evaluation material related to military promotions obtained under promise of confidentiality.

An individual may sue to challenge a denial of access to records based on the general or specific exemptions, and the court will determine the substantive and procedural propriety of the agency's assertion of the exemption (*Zeller v. U.S.*, 467 F. Supp. 487 (E.D. N.Y. 1979)).

Restrictions on Disclosure. The Act prohibits disclosure of any record covered by the Act without the written request or prior written consent of the person whom the record concerns (§552a(b)). The restriction on disclosure applies to any person or agency and includes any means of communication--written, oral, electronic or mechanical (OMB Privacy Act Guidelines, 40 Fed. Reg. 28948 at 28953 (July 9, 1975)). Information obtained (or released) through sources independent of agency records is not "disclosure" under the Act.

The general rule of nondisclosure is subject to 12 exceptions (§552a(b)(1)-(12)). They are:

- Internal agency use on a need to know basis;
- Proper requests under FOIA;
- Routine use;
- Census Bureau activities;
- Statistical research and reporting where the recipient has given written assurance that records are not individually identifiable;
- National Archives preservation;

- Use by "any governmental jurisdiction...for a civil or criminal law enforcement activity..." as long as a written request (1) is made by the head of the agency seeking the record, (2) specifies the portion of the record sought, and (3) describes the enforcement activity for which the record is sought (See *DOE v. Naval Air Station,* above);

- Showing of compelling circumstances affecting the health or safety of an individual;

- Information to Congress;

- Information to the Comptroller General in the course of performing duties of the General Accounting Office;

- Pursuant to court order (Subpoenas issued by clerks of courts are not "orders". *Stiles v. Atlanta Gas Light Co.*, 453 F. Supp. 798,800 (N.D. Ga. 1978));

- To a consumer reporting agency in accordance with 31 U.S.C. §3711(f).

"Routine use," considered generally the most important exception, is defined as "the use of such record for a purpose that is compatible with the purpose for which it was collected" (§552a(a)(d)). Each routine use is identified in the Federal Register notice upon establishment or revision of each system of records. (§552a(e)(4)(d)). This exception permits nonconsensual intra- or interagency transfer of what is generally described as "house-keeping" information. Because the language is broad, the potential for abuse is considered great, and the courts have strictly required that the use be clearly and specifically identified in the rule adopted by the agency identifying the system of records (*Covert v. Harrington*, 876 F.2d 751 (9th Cir. 1989); *DOE v. Stephens*, 851 F.2d 1457 (D.C. Cir. 1988); *Zeller v. U.S.*, 467 F. Supp. 487 (E.D.N.Y. 1979)).

Review, Relief, Remedies. The Act provides that each agency shall promulgate rules that establish, among other things, procedures of notice, disclosure, and review of requests (§552a(f)). In the event that the rules are not followed or that a dispute persists, there are four civil actions: (1) a challenge for failure to provide access; (2) a challenge for refusal to amend; (3) a damages action for improper maintenance of the content of records; and (4) a damages action for other breaches of the Act or regulations issued thereunder that adversely affect the individual (§552a(g)(1)). The latter two actions require proof of damages and are limited to actual damages. A cause of action for monetary damages requires a showing of an agency's intentional or willful failure to maintain accurate records and that the violation of the Act caused the actual damages complained of (*Molerio v. FBI*, 749 F.2d 815 (D.C. Cir. 1984)). While "actual damages" may include physical and mental injury as well as "out-of-pocket" expenses (*Johnson v. Dept. of Treasury*, 700 F.2d 971 (5th Cir. 1983)), direct evidence of expense for psychiatric care or other pecuniary losses necessitated by the Act's violation is required (*Fitzpatrick v. IRS*, 665 F.2d 327 (11th Cir. 1982)). Remedies for failure to grant access or refusal to amend are injunctive.

An individual bringing a claim under section 552a(g)(1) must demonstrate a causal connection between the alleged violation and the harm suffered but may not use the Privacy Act claim as the forum in which to prove the entitlement the individual claims was improperly denied (*Gizoni v. Southwest Marine, Inc.*, 909 F.2d 385 (9th Cir. 1990)).

Criminal penalties are established for willful disclosure of records by those who know such disclosure is prohibited, willful maintenance of a system of records without meeting the appropriate notice requirements, and knowing and willful requests for records under false pretenses (§552a(i)). Each violation is classified as a misdemeanor, and the violator may be fined not more than $5,000.

The Act provides a 2-year statute of limitations (§552a(g)(5)). The time begins to run when a reasonable person should have known of the alleged violation. *Rose v. U.S.*, 905 F.2d 1257, 1259 (9th Cir. 1990); *Diliberti v. U.S.*, 817 F.2d 1259, 1262 (7th Cir. 1987).

Computer Matching. The Act was amended in 1988 by Pub. L. No. 100-503, the Computer Matching and Privacy Protection Act of 1988. The Office of Management and Budget issued final guidance implementing the amendment's provisions on June 19, 1989 (54 Fed. Reg. 25818 (June 19, 1989)). The amendments added sections 552a(o)-(q) to establish procedural safeguards affecting agencies' use of Privacy Act records when performing computerized matching programs. The amendments require agencies to conclude written agreements specifying terms and safeguards under which matches are to be done. They provide procedures for individuals whose information is contained in the affected records to use to prevent agencies from taking adverse actions unless they have independently verified the results of matching and given the individual 30 days' advance notice. Oversight is established by requiring Federal Register notice of matching agreements, by requiring reports to OMB and Congress, and by requiring the establishment of internal "data integrity boards" to oversee and coordinate the agency's implementation of matching programs.

Relationship to FOIA. Two provisions relate to the Freedom of Information Act (5 U.S.C. §552). Section 552a(b)(2) exempts agencies from the requirement of obtaining an individual's consent to release of information subject to disclosure under FOIA. In 1984, Congress added provisions delineating an individual's access rights to records exempt from disclosure under FOIA or the Privacy Act. An agency must give an individual access to a record if it is accessible under either act irrespective of whether it might be withheld under the other (§552a(t)). This gives maximum access to records by an individual whose personal information is contained therein. An accounting of the number of FOIA releases of Privacy Act information is not required (§552a(c)(1)). If released under FOIA, the agency is relieved from ensuring the accuracy, completeness, timeliness, and relevance of the record (§552a(e)(6)). If the system of records is made necessary by FOIA, the agency may exempt the system from the Privacy Act (§552a(k)(1)).

Social Security Numbers. The Act restricts use of an individual's Social Security account number. ((Section 7 of Pub. L. No. 93-579, 88 Stat. 1896) (not codified as part of 5 U.S.C. §552a)). This provision applies to state and local governments as well as the federal government and makes it unlawful to deny any right, benefit, or privilege based on an individual's failure to disclose the Social Security account number, unless the disclosure was required by any federal, state, or local system of records in operation before January 1, 1975, or the disclosure is required by federal law. Since enactment, Congress has required disclosure in the Tax Reform Act of 1976, the Deficit Reduction Act of 1984, and the Debt Collection Act of 1982. In the Tax Reform Act of 1976, Congress declared it to be U.S. policy to use Social Security account numbers "in the administration of any tax, general public assistance, driver's license, or motor vehicle registration law..."

(Pub. L. No. 94-455, 90 Stat. 1520, 1711 (1976), *amending* 42 U.S.C. §405(c)(2)).

Oversight:

The Office of Management and Budget is required by the Act to develop guidelines and regulations for its implementation and to provide continuing assistance and oversight. OMB's guidelines are contained in "Office of Management and Budget (OMB) Guidelines on the Administration of the Privacy Act of 1974" (July 1, 1975, supplemented November 21, 1975); Appendix I to OMB Circular No. A-130 (50 Fed. Reg. 52738, December 24, 1985); and "Final Guidance Interpreting the Provisions of Pub. L. No. 100-503, the Computer Matching and Privacy Protection Act of 1988," 54 Fed. Reg. 25818, June 19, 1989. The OMB guidelines are entitled to the usual deference accorded the interpretations of the agency charged with administration of a statute. (*Albright v. U.S.*, 631 F.2d 915, 919, n. 5 (D.C. Cir. 1980)).

Legislative History:

The Act reflects the merger of seemingly disparate bills from the Senate and the House: S. 3418, introduced by Senator Ervin, and H.R. 16373, supported by the Administration. The Senate bill would have granted sweeping powers to a Federal Privacy Board for the oversight of collection, maintenance and dissemination of individually identifiable information by both the public and private sectors, while the House bill focused on access to and correction of records, as well as data collection and maintenance standards. The Senate approved its bill on November 21, 1974 after consideration and, on the same day, the House bill was passed by a 353 to 1 vote, after 2 days of floor debate.

The bills were not reconciled by the usual conference committee because of the limited time available between the end of Thanksgiving recess and the end of the session. Instead, the respective staffs of the committees studied the differing bills, reported to the committees and, after informal meetings, reached an agreement. The description of the amendments that made the two bills identical (thus avoiding a conference committee) was inserted into the record of both sides, and both houses passed identical bills. Thus, many of the most important provisions of the bill are not explained by committee reports. The only record of the final negotiations leading to the bill actually adopted is a staff memorandum entitled "Analysis of House and Senate Compromise Amendments to the Federal Privacy Act" (see 120 Cong. Rec. 40445, December 17, 1974; see also *Source Book on Privacy* at 858).

The final product included most of the fair information practices defined in the Senate version and the access and correction provisions of the House bill. None of the Senate provisions relating to a Federal Privacy Board was included. However, the Act provided for two important means of further development and oversight:

- It instructed OMB to develop guidelines for the implementation of the Act throughout the executive branch; and

- The Privacy Protection Study Commission was created by the Act to study the issues raised by the Act and to recommend further legislation, and it subsequently completed its thorough and informative report, *Personal Privacy in an Information Society*.

The bill was signed by President Ford on December 31, 1974 and became effective in September 1975.

Source Note:

The legislative history of the original Act is exhaustively collected in *Legislative History of the Privacy Act of 1974, S. 3418 (Pub. L. 93-579): Source Book on Privacy* (1976) (See Bibliography). The Department of Justice's *Overview of the Privacy Act of 1974* (1991) is updated periodically and discusses case law under the Act.

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3. *H. Rept. No. 100-802*, 100th Cong., 2d Sess. (1988), 134 Cong. Rec. S13001 (daily ed. Sept. 20, 1988).

4. *S. Rept. No. 100-516*, 100th Cong., 2d Sess. (1988), 134 Cong. Rec. S13001 (daily ed. Sept. 20, 1988).

5. *Who Cares About Privacy? Oversight of the Privacy Act of 1974 by the Office of Management and Budget and by the Congress*, H. Rept. No. 98-455, 98th Cong., 1st Sess. (1983); *Hearings on Oversight of the Privacy Act of 1974 Before a Subcommittee of the House Committee on Government Operations,* 98th Cong., 1st Sess. (1983).

6. *H. Rept. No. 98-726, Part 2*, 98th Cong., 2d Sess. (1984).

II. Other Government Documents

1. Office of Management and Budget, Debt Collection Act Guidelines, 48 Fed. Reg. 15556 (April 11, 1983).

2. Office of Management and Budget, Final Guidance on Privacy Act Implications of "call detail" Programs, 52 Fed. Reg. 12, 290-3 (April 20, 1987).

3. Office of Management and Budget, Privacy Act Guidelines, 40 Fed. Reg. 28948 (July 9, 1975), supplemented at 56741 (1975); 49 Fed. Reg. 12338 (1984), and 54 Fed. Reg. 25818 (1989).

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5. *Personal Privacy in an Information Society: The Report of the Privacy Protection Study Commission* (GPO, July 1977).

6. U.S. Department of Justice, *Overview of the Privacy Act of 1974* (1991).

7. U.S. General Accounting Office, *Computer Matching: Assessing its Costs and Benefits*, GAO/PEMD-87-2 (November 1986).

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III. Selected Books and Articles

1. *Privacy Act: D.C. Circuit Review*, 56 George Washington L. Rev. (May and August 1987 and 1988).

2. Susman, *Privacy Act and the Freedom of Information Act: Conflict and Resolution*, 21 John Marshall L. Rev. 703 (1988).

3. G. Trubow ed., *Privacy Law and Practice* (New York: Matthew Bender, 1990) (see especially Ehlke, *The Privacy Act of 1974*, Chap. 2).

IV. Selected Cases

1. *Stiles v. Atlanta Gas Light Co.*, 453 F. Supp. 798 (N.D. Ga. 1978).
2. *Zeller v. United States,* 467 F. Supp. 487 (E.D.N.Y. 1979).
3. *Albright v. United States*, 631 F.2d 915 (D.C. Cir. 1980).
4. *Lovell v. Alderete*, 630 F.2d 428 (5th Cir. 1980).
5. *Exner v. FBI*, 612 F.2d 1202 (9th Cir. 1980).
6. *United States v. Miller*, 643 F.2d 713 (10th Cir. 1981).
7. *Fitzpatrick v. United States*, 665 F.2d 327 (11th Cir. 1982).
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9. *Johnson v. Department of the Treasury*, 700 F.2d 971 (5th Cir. 1983).
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11. *Molerio v. FBI*, 749 F.2d 815 (D.C. Cir. 1984).
12. *Elm v. National R. R. Passenger Corp.*, 732 F.2d 1250 (5th Cir. 1984), *cert. denied*, 469 U.S. 982 (1984).
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15. *DOE v. United States*, 821 F.2d 694 (D.C. Cir. 1987).
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17. *Johnston v. Horne*, 875 F.2d 1415 (9th Cir. 1989).
18. *Pototsky v. Department of the Navy*, 717 F. Supp. 20 (D. Mass. 1989).
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2. Office of Management and Budget, Implementation of the Privacy Act of 1974, Supplementary Guidance, 40 Fed. Reg. 56741 (December 4, 1975).

3. Office of Management and Budget, Revised Supplemental Guidance for Conducting Matching Programs, 47 Fed. Reg. 21656 (May 19, 1982).

4. Office of Management and Budget, Management of Federal Information Resources; Final Publication of OMB Circular A-130, 50 Fed. Reg. 52730 (December 24, 1985).

5. Office of Management and Budget, Final Guidance Interpreting the Provisions of Public Law No. 100 - 503, the Computer Matching and Privacy Protection Act of 1988, 54 Fed. Reg. 25818 (June 19, 1989).

Privacy Act

Title 5, U.S. Code

§552a. Records maintained on individuals

(a) Definitions.

For purposes of this section--

(1) the term "agency" means agency as defined in section 552(e) of this title;

(2) the term "individual" means a citizen of the United States or an alien lawfully admitted for permanent residence;

(3) the term "maintain" includes maintain, collect, use, or disseminate;

(4) the term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;

(5) the term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;

(6) the term "statistical record" means a record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual, except as provided by section 8 of title 13;

(7) the term "routine use" means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected;

(8) the term "matching program"--

(A) means any computerized comparison of--

(i) two or more automated systems of records or a system of records with non-Federal records for the purpose of--

(I) establishing or verifying the eligibility of, or continuing compliance with statutory and regulatory requirements by, applicants for, recipients or beneficiaries of, participants in, or providers of services with respect to, cash or in-kind assistance or payments under Federal benefit programs, or

(II) recouping payments or delinquent debts under such Federal benefit programs, or

(ii) two or more automated Federal personnel or payroll systems of records or a system of Federal personnel or payroll records with non-Federal records,

(B) but does not include--

(i) matches performed to produce aggregate statistical data without any personal identifiers;

(ii) matches performed to support any research or statistical project, the specific data of which may not be used to make decisions concerning the rights, benefits, or privileges of specific individuals;

(iii) matches performed, by an agency (or component thereof) which performs as its principal function any activity pertaining to the enforcement of criminal laws, subsequent to the initiation of a specific criminal or civil law enforcement investigation of a named person or persons for the purpose of gathering evidence against such person or persons;

(iv) matches of tax information (I) pursuant to section 6103(d) of the Internal Revenue Code of 1986, (II) for purposes of tax administration as defined in section 6103(b)(4) of such Code, (III) for the purpose of intercepting a tax refund due an individual under authority granted by section 464 or 1137 of the Social Security Act; or (IV) for the purpose of intercepting a tax refund due an individual under any other tax refund intercept program authorized by statute which has been determined by the Director of the Office of Management and Budget to contain verification, notice, and hearing requirements that are substantially similar to the procedures in section 1137 of the Social Security Act;

(v) matches--

(I) using records predominantly relating to Federal personnel, that are performed for routine administrative purposes (subject to guidance provided by the Director of the Office of Management and Budget pursuant to subsection (v)); or

(II) conducted by an agency using only records from systems of records maintained by that agency;

if the purpose of the match is not to take any adverse financial, personnel, disciplinary, or other adverse action against Federal personnel; or

(vi) matches performed for foreign counterintelligence purposes or to produce background checks for security clearances of Federal personnel or Federal contractor personnel;

(9) the term "recipient agency" means any agency, or contractor thereof, receiving records contained in a system of records from a source agency for use in a matching program;

(10) the term "non-Federal agency" means any State or local government, or agency thereof, which receives records contained in a system of records from a source agency for use in a matching program;

(11) the term "source agency" means any agency which discloses records contained in a system of records to be used in a matching program, or any State or local government, or agency thereof, which discloses records to be used in a matching program;

(12) the term "Federal benefit program" means any program administered or funded by the Federal Government, or by any agent or State on behalf of the Federal Government, providing cash or in-kind assistance in the form of payments, grants, loans, or loan guarantees to individuals; and

(13) the term "Federal personnel" means officers and employees of the Government of the United States, members of the uniformed services (including members of the Reserve Components), individuals entitled to receive immediate or deferred retirement benefits under any retirement program of the Government of the United States (including survivor benefits).

(b) Conditions of Disclosure.

No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be--

(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;

(2) required under section 552 of this title;

(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;

(4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13;

(5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

(6) to the National Archives and Records Administration as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Archivist of the United States or the designee of the Archivist to determine whether the record has such value;

(7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;

(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;

(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

(10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting Office;

(11) pursuant to the order of a court of competent jurisdiction; or

(12) to a consumer reporting agency in accordance with section 3711(f) of title 31.

(c) Accounting of Certain Disclosures.

Each agency, with respect to each system of records under its control, shall--

(1) except for disclosures made under subsections (b)(1) or (b)(2) of this section, keep an accurate accounting of--

(A) the date, nature, and purpose of each disclosure of a record to any person or to another agency made under subsection (b) of this section; and

(B) the name and address of the person or agency to whom the disclosure is made;

(2) retain the accounting made under paragraph (1) of this subsection for at least five years or the life of the record, whichever is longer, after the disclosure for which the accounting is made;

(3) except for disclosures made under subsection (b)(7) of this section, make the accounting made under paragraph (1) of this subsection available to the individual named in the record at his request; and

(4) inform any person or other agency about any correction or notation of dispute made by the agency in accordance with subsection (d) of this section of any record that has been disclosed to the person or agency if an accounting of the disclosure was made.

(d) Access to Records.

Each agency that maintains a system of records shall--

(1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;

(2) permit the individual to request amendment of a record pertaining to him and--

(A) not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date of receipt of such request, acknowledge in writing such receipt; and

(B) promptly, either--

(i) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or

(ii) inform the individual of its refusal to amend the record in accordance with his request, the reason for the refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency, and the name and business address of that official;

(3) permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal, and not later than 30 days (excluding Saturdays, Sundays, and legal public holidays) from the date on which the individual requests such review, complete such review and make a final determination unless, for good cause shown, the head of the agency extends such 30-day period; and if, after his review, the reviewing official also refuses to amend the record in accordance with the request, permit the individual to file with the agency a concise statement setting forth the reasons for his disagreement with the refusal of the agency, and notify the individual of the provisions for judicial review of the reviewing official's determination under subsection (g)(1)(A) of this section;

(4) in any disclosure, containing information about which the individual has filed a statement of disagreement, occurring after the filing of the statement under paragraph (3) of this subsection, clearly note any portion of the record which is disputed and provide copies of the statement and, if the agency deems it

appropriate, copies of a concise statement of the reasons of the agency for not making the amendments requested, to persons or other agencies to whom the disputed record has been disclosed; and

(5) nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.

(e) Agency Requirements.

Each agency that maintains a system of records shall--

(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President;

(2) collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs;

(3) inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual--

(A) the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;

(B) the principal purpose or purposes for which the information is intended to be used;

(C) the routine uses which may be made of the information, as published pursuant to paragraph (4)(D) of this subsection; and

(D) the effects on him, if any, of not providing all or any part of the requested information;

(4) subject to the provisions of paragraph (11) of this subsection, publish in the Federal Register upon establishment or revision a notice of the existence and character of the system of records, which notice shall include--

(A) the name and location of the system;

(B) the categories of individuals on whom records are maintained in the system;

(C) the categories of records maintained in the system;

(D) each routine use of the records contained in the system, including the categories of users and the purpose of such use;

(E) the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records;

(F) the title and business address of the agency official who is responsible for the system of records;

(G) the agency procedures whereby an individual can be notified at his request if the system of records contains a record pertaining to him;

(H) the agency procedures whereby an individual can be notified at his request how he can gain access to any record pertaining to him contained in the system of records, and how he can contest its content; and

(I) the categories of sources of records in the system;

(5) maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and

completeness as is reasonably necessary to assure fairness to the individual in the determination;

(6) prior to disseminating any record about an individual to any person other than an agency, unless the dissemination is made pursuant to subsection (b)(2) of this section, make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes;

(7) maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity;

(8) make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record;

(9) establish rules of conduct for persons involved in the design, development, operation, or maintenance of any system of records, or in maintaining any record, and instruct each such person with respect to such rules and the requirements of this section, including any other rules and procedures adopted pursuant to this section and the penalties for noncompliance;

(10) establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained;

(11) at least 30 days prior to publication of information under paragraph (4)(D) of this subsection, publish in the Federal Register notice of any new use or intended use of the information in the system, and provide an opportunity for interested persons to submit written data, views, or arguments to the agency; and

(12) if such agency is a recipient agency or a source agency in a matching program with a non-Federal agency, with respect to any establishment or revision of a matching program, at least 30 days prior to conducting such program, publish in the Federal Register notice of such establishment or revision.

(f) Agency Rules.

In order to carry out the provisions of this section, each agency that maintains a system of records shall promulgate rules, in accordance with the requirements (including general notice) of section 553 of this title, which shall--

(1) establish procedures whereby an individual can be notified in response to his request if any system of records named by the individual contains a record pertaining to him;

(2) define reasonable times, places, and requirements for identifying an individual who requests his record or information pertaining to him before the agency shall make the record or information available to the individual;

(3) establish procedures for the disclosure to an individual upon his request of his record or information pertaining to him, including special procedure, if deemed necessary, for the disclosure to an individual of medical records, including psychological records, pertaining to him;

(4) establish procedures for reviewing a request from an individual concerning the amendment of any record or information pertaining to the individual, for

making a determination on the request, for an appeal within the agency of an initial adverse agency determination, and for whatever additional means may be necessary for each individual to be able to exercise fully his rights under this section; and

(5) establish fees to be charged, if any, to any individual for making copies of his record, excluding the cost of any search for and review of the record.

The Office of the Federal Register shall biennially compile and publish the rules promulgated under this subsection and agency notices published under subsection (e)(4) of this section in a form available to the public at low cost.

(g)(1) Civil Remedies.

Whenever any agency--

(A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;

(B) refuses to comply with an individual request under subsection (d)(1) of this section;

(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

(2)(A) In any suit brought under the provisions of subsection (g)(1)(A) of this section, the court may order the agency to amend the individual's record in accordance with his request or in such other way as the court may direct. In such a case the court shall determine the matter de novo.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(3)(A) In any suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter de novo, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which

was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of--

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and

(B) the costs of the action together with reasonable attorney fees as determined by the court.

(5) An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy, within two years from the date on which the cause of action arises, except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation. Nothing in this section shall be construed to authorize any civil action by reason of any injury sustained as the result of a disclosure of a record prior to September 27, 1975.

(h) Rights of Legal Guardians.

For the purposes of this section, the parent of any minor, or the legal guardian of any individual who has been declared to be incompetent due to physical or mental incapacity or age by a court of competent jurisdiction, may act on behalf of the individual.

(i) Criminal Penalties.

(1) Any officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this section or by rules or regulations established thereunder, and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than $5,000.

(2) Any officer or employee of any agency who willfully maintains a system of records without meeting the notice requirements of subsection (e)(4) of this section shall be guilty of a misdemeanor and fined not more than $5,000.

(3) Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses shall be guilty of a misdemeanor and fined not more than $5,000.

(j) General Exemptions.

The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from any part of this section except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) if the system of records is--

(1) maintained by the Central Intelligence Agency; or

(2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

(k) Specific Exemptions.

The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from subsections (c)(3), (d), (e)(1), (e)(4)(G), (H), and (I) and (f) of this section if the system of records is--

(1) subject to the provisions of section 552(b)(1) of this title;

(2) investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2) of this section: Provided, however, That if any individual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(3) maintained in connection with providing protective services to the President of the United States or other individuals pursuant to section 3056 of title 18;

(4) required by statute to be maintained and used solely as statistical records;

(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date

of this section, under an implied promise that the identity of the source would be held in confidence;

(6) testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service the disclosure of which would compromise the objectivity or fairness of the testing or examination process; or

(7) evaluation material used to determine potential for promotion in the armed services, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

(l) Archival Records.

(1) Each agency record which is accepted by the Archivist of the United States for storage, processing, and servicing in accordance with section 3103 of title 44 shall, for the purposes of this section, be considered to be maintained by the agency which deposited the record and shall be subject to the provisions of this section. The Archivist of the United States shall not disclose the record except to the agency which maintains the record, or under rules established by that agency which are not inconsistent with the provisions of this section.

(2) Each agency record pertaining to an identifiable individual which was transferred to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, prior to the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall not be subject to the provisions of this section, except that a statement generally describing such records (modeled after the requirements relating to records subject to subsections (e)(4)(A) through (G) of this section) shall be published in the Federal Register.

(3) Each agency record pertaining to an identifiable individual which is transferred to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, on or after the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall be exempt from the requirements of this section except subsections (e)(4)(A) through (G) and (e)(9) of this section.

(m) Government Contractors.

(1) When an agency provides by a contract for the operation by or on behalf of the agency of a system of records to accomplish an agency function, the agency shall, consistent with its authority, cause the requirements of this section to be applied to such system. For purposes of subsection (i) of this section any such contractor and any employee of such contractor, if such contract is agreed to on

or after the effective date of this section, shall be considered to be an employee of an agency.

(2) A consumer reporting agency to which a record is disclosed under section 3711(f) of title 31 shall not be considered a contractor for the purposes of this section.

(n) Mailing Lists.

An individual's name and address may not be sold or rented by an agency unless such action is specifically authorized by law. This provision shall not be construed to require the withholding of names and addresses otherwise permitted to be made public.

(o) Matching Agreements.

(1) No record which is contained in a system of records may be disclosed to a recipient agency or non-Federal agency for use in a computer matching program except pursuant to a written agreement between the source agency and the recipient agency or non-Federal agency specifying--

(A) the purpose and legal authority for conducting the program;

(B) the justification for the program and the anticipated results, including a specific estimate of any savings;

(C) a description of the records that will be matched, including each data element that will be used, the approximate number of records that will be matched, and the projected starting and completion dates of the matching program;

(D) procedures for providing individualized notice at the time of application, and notice periodically thereafter as directed by the Data Integrity Board of such agency (subject to guidance provided by the Director of the Office of Management and Budget pursuant to subsection (v)), to--

(i) applicants for and recipients of financial assistance or payments under Federal benefit programs, and

(ii) applicants for and holders of positions as Federal personnel,

that any information provided by such applicants, recipients, holders, and individuals may be subject to verification through matching programs;

(E) procedures for verifying information produced in such matching program as required by subsection (p);

(F) procedures for the retention and timely destruction of identifiable records created by a recipient agency or non-Federal agency in such matching program;

(G) procedures for ensuring the administrative, technical, and physical security of the records matched and the results of such programs;

(H) prohibitions on duplication and redisclosure of records provided by the source agency within or outside the recipient agency or the non-Federal agency, except where required by law or essential to the conduct of the matching program;

(I) procedures governing the use by a recipient agency or non-Federal agency of records provided in a matching program by a source agency, including procedures governing return of the records to the source agency or destruction of records used in such program;

(J) information on assessments that have been made on the accuracy of the records that will be used in such matching program; and

(K) that the Comptroller General may have access to all records of a recipient agency or a non-Federal agency that the Comptroller General deems necessary in order to monitor or verify compliance with the agreement.

(2)(A) A copy of each agreement entered into pursuant to paragraph (1) shall--

(i) be transmitted to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives; and

(ii) be available upon request to the public.

(B) No such agreement shall be effective until 30 days after the date on which such a copy is transmitted pursuant to subparagraph (A)(i).

(C) Such an agreement shall remain in effect only for such period, not to exceed 18 months, as the Data Integrity Board of the agency determines is appropriate in light of the purposes, and length of time necessary for the conduct, of the matching program.

(D) Within 3 months prior to the expiration of such an agreement pursuant to subparagraph (C), the Data Integrity Board of the agency may, without additional review, renew the matching agreement for a current, ongoing matching program for not more than one additional year if--

(i) such program will be conducted without any change; and

(ii) each party to the agreement certifies to the Board in writing that the program has been conducted in compliance with the agreement.

(p) Verification and Opportunity to Contest Findings.

(1) In order to protect any individual whose records are used in a matching program, no recipient agency, non-Federal agency, or source agency may suspend, terminate, reduce, or make a final denial of any financial assistance or payment under a Federal benefit program to such individual, or take other adverse action against such individual, as a result of information produced by such matching program, until--

(A)(i) the agency has independently verified the information; or

(ii) the Data Integrity Board of the agency, or in the case of a non-Federal agency the Data Integrity Board of the source agency, determines in accordance with guidance issued by the Director of the Office of Management and Budget that--

(I) the information is limited to identification and amount of benefits paid by the source agency under a Federal benefit program; and

(II) there is a high degree of confidence that the information provided to the recipient agency is accurate;

(B) the individual receives a notice from the agency containing a statement of its findings and informing the individual of the opportunity to contest such findings; and

(C)(i) the expiration of any time period established for the program by statute or regulation for the individual to respond to that notice; or

(ii) in the case of a program for which no such period is established, the end of the 30-day period beginning on the date on which notice under subparagraph (B) is mailed or otherwise provided to the individual.

(2) Independent verification referred to in paragraph (1) requires investigation and confirmation of specific information relating to an individual that is used as a basis for an adverse action against the individual, including where applicable investigation and confirmation of--

(A) the amount of any asset or income involved;

(B) whether such individual actually has or had access to such asset or income for such individual's own use; and

(C) the period or periods when the individual actually had such asset or income.

(3) Notwithstanding paragraph (1), an agency may take any appropriate action otherwise prohibited by such paragraph if the agency determines that the public health or public safety may be adversely affected or significantly threatened during any notice period required by such paragraph.

(q) Sanctions.

(1) Notwithstanding any other provision of law, no source agency may disclose any record which is contained in a system of records to a recipient agency or non-Federal agency for a matching program if such source agency has reason to believe that the requirements of subsection (p), or any matching agreement entered into pursuant to subsection (o), or both, are not being met by such recipient agency.

(2) No source agency may renew a matching agreement unless--

(A) the recipient agency or non-Federal agency has certified that it has complied with the provisions of that agreement; and

(B) the source agency has no reason to believe that the certification is inaccurate.

(r) Report on New Systems and Matching Programs.

Each agency that proposes to establish or make a significant change in a system of records or a matching program shall provide adequate advance notice of any such proposal (in duplicate) to the Committee on Government Operations of the House of Representatives, the Committee on Governmental Affairs of the Senate, and the Office of Management and Budget in order to permit an evaluation of the probable or potential effect of such proposal on the privacy or other rights of individuals.

(s) Biennial Report.

The President shall biennially submit to the Speaker of the House of Representatives and the President pro tempore of the Senate a report--

(1) describing the actions of the Director of the Office of Management and Budget pursuant to section 6 of the Privacy Act of 1974 during the preceding 2 years;

(2) describing the exercise of individual rights of access and amendment under this section during such years;

(3) identifying changes in or additions to systems of records;

(4) containing such other information concerning administration of this section as may be necessary or useful to the Congress in reviewing the effectiveness of this section in carrying out the purposes of the Privacy Act of 1974.

(t) Effect of Other Laws.

(1) No agency shall rely on any exemption contained in section 552 of this title to withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section.

(2) No agency shall rely on any exemption in this section to withhold from an individual any record which is otherwise accessible to such individual under the provisions of section 552 of this title.

(u) Data Integrity Boards.

(1) Every agency conducting or participating in a matching program shall establish a Data Integrity Board to oversee and coordinate among the various components of such agency the agency's implementation of this section.

(2) Each Data Integrity Board shall consist of senior officials designated by the head of the agency, and shall include any senior official designated by the head of the agency as responsible for implementation of this section, and the inspector general of the agency, if any. The inspector general shall not serve as chairman of the Data Integrity Board.

(3) Each Data Integrity Board--

(A) shall review, approve, and maintain all written agreements for receipt or disclosure of agency records for matching programs to ensure compliance with subsection (o), and all relevant statutes, regulations, and guidelines;

(B) shall review all matching programs in which the agency has participated during the year, either as a source agency or recipient agency, determine compliance with applicable laws, regulations, guidelines, and agency agreements, and assess the costs and benefits of such programs;

(C) shall review all recurring matching programs in which the agency has participated during the year, either as a source agency or recipient agency, for continued justification for such disclosures;

(D) shall compile an annual report, which shall be submitted to the head of the agency and the Office of Management and Budget and made available to the public on request, describing the matching activities of the agency, including--

(i) matching programs in which the agency has participated as a source agency or recipient agency;

(ii) matching agreements proposed under subsection (o) that were disapproved by the Board;

(iii) any changes in membership or structure of the Board in the preceding year;

(iv) the reasons for any waiver of the requirement in paragraph (4) of this section for completion and submission of a cost-benefit analysis prior to the approval of a matching program;

(v) any violations of matching agreements that have been alleged or identified and any corrective action taken; and

(vi) any other information required by the Director of the Office of Management and Budget to be included in such report;

(E) shall serve as a clearinghouse for receiving and providing information on the accuracy, completeness, and reliability of records used in matching programs;

(F) shall provide interpretation and guidance to agency components and personnel on the requirements of this section for matching programs;

(G) shall review agency recordkeeping and disposal policies and practices for matching programs to assure compliance with this section; and

(H) may review and report on any agency matching activities that are not matching programs.

(4)(A) Except as provided in subparagraphs (B) and (C), a Data Integrity Board shall not approve any written agreement for a matching program unless the agency has completed and submitted to such Board a cost-benefit analysis of the proposed program and such analysis demonstrates that the program is likely to be cost effective.[1]

(B) The Board may waive the requirements of subparagraph (A) of this paragraph if it determines in writing, in accordance with guidelines prescribed by the Director of the Office of Management and Budget, that a cost-benefit analysis is not required.

(C) A cost-benefit analysis shall not be required under subparagraph (A) prior to the initial approval of a written agreement for a matching program that is specifically required by statute. Any subsequent written agreement for such a program shall not be approved by the Data Integrity Board unless the agency has submitted a cost-benefit analysis of the program as conducted under the preceding approval of such agreement.

(5)(A) If a matching agreement is disapproved by a Data Integrity Board, any party to such agreement may appeal the disapproval to the Director of the Office of Management and Budget. Timely notice of the filing of such an appeal shall be provided by the Director of the Office of Management and Budget to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives.

(B) The Director of the Office of Management and Budget may approve a matching agreement notwithstanding the disapproval of a Data Integrity Board if the Director determines that--

(i) the matching program will be consistent with all applicable legal, regulatory, and policy requirements;

(ii) there is adequate evidence that the matching agreement will be cost-effective; and

(iii) the matching program is in the public interest.

(C) The decision of the Director to approve a matching agreement shall not take effect until 30 days after it is reported to committees described in subparagraph (A).

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[1] So in original. Probably should be "cost-effective."

(D) If the Data Integrity Board and the Director of the Office of Management and Budget disapprove a matching program proposed by the inspector general of an agency, the inspector general may report the disapproval to the head of the agency and to the Congress.

(6) The Director of the Office of Management and Budget shall, annually during the first 3 years after the date of enactment of this subsection and biennially thereafter, consolidate in a report to the Congress the information contained in the reports from the various Data Integrity Boards under paragraph (3)(D). Such report shall include detailed information about costs and benefits of matching programs that are conducted during the period covered by such consolidated report, and shall identify each waiver granted by a Data Integrity Board of the requirement for completion and submission of a cost-benefit analysis and the reasons for granting the waiver.

(7) In the reports required by paragraphs (3)(D) and (6), agency matching activities that are not matching programs may be reported on an aggregate basis, if and to the extent necessary to protect ongoing law enforcement or counterintelligence investigations.

(v) Office of Management and Budget Responsibilities.

The Director of the Office of Management and Budget shall--

(1) develop and, after notice and opportunity for public comment, prescribe guidelines and regulations for the use of agencies in implementing the provisions of this section; and

(2) provide continuing assistance to and oversight of the implementation of this section by agencies.

(Added Pub. L. No. 93-579, §3, Dec. 31, 1974, 88 Stat. 1897, and amended Pub. L. No. 94-183, §2(2), Dec. 31, 1975, 89 Stat. 1057; Pub. L. No. 97-365, §2, Oct. 25, 1982, 96 Stat. 1749; Pub. L. No. 97-375, title II, §201(a), (b), Dec. 21, 1982, 96 Stat. 1821; Pub. L. No. 97-452, §2(a)(1), Jan. 12, 1983, 96 Stat. 2478; Pub. L. No. 98-477, §2(c), Oct. 15, 1984, 98 Stat. 2211; Pub. L. No. 98-497, title I, §107(g), Oct. 19, 1984, 98 Stat. 2292; Pub. L. No. 100-503, §§2-6(a), 7, 8, Oct. 18, 1988, 102 Stat. 2507-2514; Pub. L. No. 101-508, title VII, §7201(b)(1), Nov. 5, 1990, 104 Stat. 1388-334.)

IMPLEMENTATION OF THE PRIVACY ACT OF 1974

SUPPLEMENTARY GUIDANCE

Office of Management and Budget
40 Fed. Reg. 5674 (Dec. 4, 1975)

OFFICE OF MANAGEMENT AND BUDGET

IMPLEMENTATION OF THE PRIVACY ACT OF 1974

Supplementary Guidance

NOVEMBER 21, 1975.

This material is provided to address comments and questions of general interest raised since the release of the Office of Management and Budget's guidelines for implementing section 3 of the Privacy Act of 1974. (FEDERAL REGISTER, Volume 40, Number 132, dated July 9, 1975, pp. 28949–28978.)

Additional supplements will be issued as necessary.

JAMES T. LYNN,
Director.

1. *Definition of System of Records* (5 U.S.C. 552a(a)(5)). On page 28952, third column, after line 27, add:

"Following are several examples of the use of the term 'system of records':

"Telephone directories. Agency telephone directories are typically derived from files (e.g., locator cards) which are, themselves, systems of records. For example, agency personnel records may be used to produce a telephone directory which is distributed to personnel of the agency and may be made available to the public pursuant to 5 U.S.C. 552a(b) (1) and (2), (intra-agency and public disclosure, respectively). In this case the directory could be a disclosure from the system of records and, thus, would not be a separate system. On the other hand, a separate directory system would be a system of records if it contains personal information. A telephone directory, in this context, is a list of names, titles, addresses, telephone numbers, and organizational designations. An agency should not utilize this distinction to avoid the requirements of the Act including the requirement to report the existence of systems of records which it maintains.

"Mailing lists. Whether or not a mailing list is a system of records depends on whether the agency keeps the list as a separate system. Mailing lists derived from records compiled for other purposes (e.g., licensing) could be considered disclosures from that system and would not be systems of records. If the system from which the list is produced is a system of records, the decision on the disclosability of the list would have to be made in terms of subsection (b) (conditions of disclosure) and subsection (n) (the sale or rental of mailing lists). A mailing list may, in some instances, be a stand-alone system (e.g., subscription lists) and could be a system of records subject to the Act if the list is maintained separately by the agency, it consists of records (i.e., contains personal information), and information is retrieved by reference to name or some other identifying particular.

"Libraries. Standard bibliographic materials maintained in agency libraries such as library indexes, Who's Who volumes and similar materials are not considered to be systems of records. This is *not* to suggest that all published material is, by virtue of that fact, not subject to the Act. Collections of newspaper clippings or other published matter about an individual maintained other than in a conventional reference library would normally be a system of records."

2. *Routine Uses—Intra-agency disclosures* (5 U.S.C. 552a(a)(7))

On page 28953, first column, after line 17, add:

"Intra-agency transfer need not be considered routine uses. Earlier versions of House privacy bills, from which the routine use concept derives, permitted agencies to disclose records within the agency to personnel who had a need for such access in the course of their official duties thus permitting intra-agency disclosure without the consent of the individual. The concept of routine use was developed to permit other than intra-agency disclosures after it became apparent that a substantial unnecessary workload would result from having to seek the consent of the subject of a record each time a transfer was made for a purpose '. . . compatible with the purpose for which [the record] was collected' (5 U.S.C. 552a(a)(7)). To deter promiscuous use of this concept, a further provision was added requiring that routine uses be subject to public notice.

(5 U.S.C. 552a(e)(11).) It is our view that the concept of routine use was devised to cover disclosures other than those to officers or employees who have a need to for the record in the performance of their official duties within the agency.

"It is not necessary therefore to include intra-agency transfers in the portion of the system notice covering routine uses (5 U.S.C 552a(e)(4)(D)) but agencies may, at their option elect to do so. The portion of the system notice covering storage, retrievability access controls, retention and disposal (5 U.S.C 552a(e)(4)(E)) should describe the categories of agency officials who have access to the system."

3. *Consent for access in response to congressional inquiries* (5 U.S.C 552a(b)(9))

On page 28955, third column, after line 18, add:

To assure that implementation of the Act does not have the unintended effect of denying individuals the benefit of congressional assistance which they request, it is recommended that each agency establish the following as a routine use for all of its systems, consistent with subsections (a)(7) and (e)(11) of the Act:

> Disclosure may be made to a congressional office from the record of an individual in response to an inquiry from the congressional office made at the request of that individual.

The operation of this routine use will obviate the need for the written consent of the individual in every case where an individual requests assistance of the Member which would entail a disclosure of information pertaining to the individual.

In those cases where the congressional inquiry indicates that the request is being made on behalf of a person other than the individual whose record is to be disclosed, the agency should advise the congressional office that the written consent of the subject of the record is required. The agency should not contact the subject unless the congressional office requests it to do so.

In addition to the routine use, agencies can, of course, respond to many congressional requests for assistance on behalf of individuals without disclosing personal information which would fall within the Privacy Act, e.g., a congressional inquiry concerning a missing Social Security check can be answered by the agency by stating the reason for the delay.

Personal information can be disclosed in response to a congressional inquiry without written consent or operation of a routine use—

If the information would be required to be disclosed under the Freedom of Information Act (Subsection (b)(2));

If the Member requests that the response go directly to the individual to whom the record pertains;

In "compelling circumstances affecting the health or safety of an individual * * *" (Subsection (b)(8)); or

To either House of Congress, or to the extent of matter within its jurisdiction, any committee or subcommittee thereof * * *" (Subsection (b)(9)).

The routine use recommended above and disclosures thereunder are, of course, subject to the 30 day prior notice requirement of the Act (Subsection (e)(11)). In the interim, however, it should be possible to respond to most inquiries by using the provisions cited in the previous paragraph. Furthermore, when the congressional inquiry indicates that the request is being made on the basis of a written request from the individual to whom the record pertains consent can be inferred even if the constituent letter is not provided to the agency.

"This standard for implied consent does not apply to other than congressional inquiries."

4. *Describing the purpose in the accounting of disclosures* (Subsection (c)(1))

On page 28956, first column, after line 42, add:

"Agencies which submit inquiries to other agencies in connection with law enforcement or pre-employment investigations (e.g., record checks) are reminded to include the purpose in their record check in order to preclude having record checks returned to them to ascertain the purpose of the check. It is noted that this is necessary whether the inquiry is made pursuant to the subsection (b)(3) or (b)(7) ('routine use' or law enforcement disclosures). At a minimum, the inquiring agency must describe the purpose as either a background or law enforcement check."

5. *Agency procedures for review of appeals of denials or requests to amend a record* (Subsection (d)(3))

On page 28959, second column, after line 39, add:

"This does *not* mean that the officer on appeal must be a justice or judge. Rather, the reviewing official designated by the agency head may be a justice or judge (unlikely in this case) or any other agency official who meets the criteria in 5 U.S.C. 2104a (1), (2), and (3)."

6. *Correcting records released to an individual* (Subsection (e)(6))

On page 28965, second column, after line 6, add.

"While this language requires that agencies make reasonable efforts to assure the accuracy of a record before it is disclosed, when an individual requests access to his or her record, pursuant to subsection (d)(1) above, the record must be disclosed without change or deletion except as permitted by subsections (j) and (k), exemptions. To avoid requiring individuals to file unnecessary requests for amendment, however, the agency should review the record and annotate any material disclosed to indicate that which it intends to amend or delete."

7. *Rights of parents and legal guardians* (Subsection (h))

On page 28970, second column, after line 59, add:

"This is not intended to suggest that minors are precluded from exercising rights on their own behalf. Except as otherwise provided in the Act (e.g., general or specific exemptions) a minor does have the right to access a record pertaining to him or herself. There is no absolute right of a parent to have access to a record about a child absent a court order or consent."

8. *Relationships to the Freedom of Information Act* (Subsection (q))

On page 28978, third column, after the last line, add:

"In some instances under the Privacy Act an agency may (1) exempt a system of records (or a portion thereof) from access by individuals in accordance with the general or specific exemptions (subsection (j) or (k)); or (2) deny a request for access to records compiled in reasonable anticipation of a civil action or proceeding or archival records (subsection (d) (5) or (l)). In a few instances the exemption from disclosure under the Privacy Act may be interpreted to be broader than the Freedom of Information Act (5 U.S.C. 552). In such instances the Privacy Act should not be used to deny access to information about an individual which would otherwise have been *required* to be disclosed to that individual under the Freedom of Information Act.

"Whether a request by an individual for access to his or her record is to be processed under Privacy Act or Freedom of Information Act procedures involves several considerations. For example, while agencies have been encouraged to reply to requests for access under the Privacy Act within ten days wherever practicable, consistent with the Freedom of Information Act (FOIA), the Privacy Act does not establish time limits for responding to requests for access. (See discussion of subsection (d)(1).) The Privacy Act also does not require an administrative appeal on denial of access comparable to that under FOIA although agencies are encouraged to permit individuals to request an administrative review of initial denials of access to avoid, where possible, the need for unnecessary judicial action. It can also be argued that requests filed under the Privacy Act can be expected to be specific as to the system of records to which access is sought whereas agencies are required to respond to an FOIA request only if it 'reasonably describes' the records sought. Further, the Freedom of Information Act permits charging of fees for search as well as the making of copies while the Privacy Act permits charging only for the direct cost of making a copy upon request.

"It is our view that agencies should treat requests by individuals for information pertaining to themselves which specify either the FOIA or the Privacy Act (but not both) under the procedures established pursuant to the Act specified in the request. When the request specifies, and may be processed under, both the FOIA and the Privacy Act, or specifies neither Act, Privacy Act procedures should be employed. The individual should be advised, however, that the agency has elected to use Privacy Act procedures, of the existence and the general effect of the Freedom of Information Act, and of the differences, if any, between the agency's procedures under the two Acts (e.g., fees, time limits, access and appeals.

"The net effect of this approach should be to assure the individuals do not, as a consequence of the Privacy Act, have less access to information pertaining to themselves than they had prior to its enactment."

[FR Doc.75–32297 Filed 12–3–75;8:45 am]

REVISED SUPPLEMENTAL GUIDANCE FOR CONDUCTING MATCHING PROGRAMS

Office of Management and Budget

47 Fed. Reg. 21656 (May 19, 1982)

OFFICE OF MANAGEMENT AND BUDGET

Privacy Act of 1974; Revised Supplemental Guidance for Conducting Matching Programs

May 14, 1982.

AGENCY: Office of Management and Budget.

ACTION: Issuance of Revised Guidance for Conducting Computerized Matching Programs

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SUMMARY: This document revises and updates guidance to the agencies on conducting automated matching programs originally issued on March 30, 1979.

EFFECTIVE DATE: May 11, 1982.

FOR FURTHER INFORMATION CONTACT: Robert N. Veeder, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 3235, New Executive Office Building, Washington, D.C. 20502; telephone (202) 395–4814.

SUPPLEMENTARY INFORMATION: The Guidelines were originally issued on March 30, 1979 (44 FR 23138). After evaluating agencies experiences operating under those Guidelines and considering comments from agencies and concerned groups such as the President's Council on Integrity and Efficiency in Government, OMB concluded that a revision was in order. Accordingly, the Guidelines were revised to clarify the language and to simplify, where possible, the administrative and procedural requirements.

The Revised Guidelines were signed by the Director of OMB on May 11, 1982 and became effective on that date. Their text is set forth below.

Brenda A. Mayberry,

Acting Budget and Management Officer.

May 11, 1982.

Memorandum for the Executive Departments and Establishments

From: David A. Stockman, Director.

Subject: Revised Supplemental Guidance for Conducting Matching Programs.

I am attaching a copy of our revised Guidelines on conducting computerized matching programs. This revision updates and simplifies earlier guidance issued on March 30, 1979. It is effective immediately.

The revision is the result of our evaluation of agencies' operating experiences under the original Guidelines. The new Guidelines incorporate many agency recommendations for clarifications and changes. In addition, they greatly simplify the notice and reporting requirements of the earlier version.

Direct comments or questions on these Guidelines to OMB's Office of Information and Regulatory Affairs.

Matching Guidelines

1. *Purpose*—These Guidelines supplement and should be used in conjunction with the "OMB Guidelines on the Administration of the Privacy Act of 1974," issued on July 1, 1975 and supplemented on November 21, 1975. They replace earlier guidance on conducting computerized matching programs issued on March 30, 1979. They are intended to help agencies relate the procedural requirements of the Privacy Act to the operational requirements of computerized matching. They are designed to address the concerns expressed by the Congress in the Privacy Act of 1974 that "the increasing use of computers and sophisticated information technology, while essential to the efficient operations of the Government, has greatly magnified the harm to individual privacy that can occur from any collection, maintenance, use, or dissemination of personal information." These Guidelines do not authorize activities which are not permitted by law; nor do they prohibit activities expressly required to be performed by law. Complying with these Guidelines, however, does not relieve a Federal agency of the obligation to comply with the provisions of the Privacy Act.

including any provisions not cited in these Guidelines.

2. *Scope*—These guidelines apply to all agencies subject to the Privacy Act of 1974 (5 U.S.C. 552a), and to all matching programs:

a. Performed by a Federal agency, whether the personal records used in the match are Federal or non-Federal.

b. For which a Federal agency discloses any personal records for use in a matching program performed by any other Federal agency or any non-Federal organization.

3. *Effective Date*—These guidelines are effective on their date of issuance—May 11, 1982.

4. *Definitions*—For the purposes of these Guidelines:

a. All the terms defined in the Privacy Act of 1974 apply.

b. A "personal record" means any information pertaining to an individual that is stored in an automated system of records, e.g., a data base which contains information about individuals that is retrieved by name or some other personal identifier.

c. A "matching program" is a procedure in which a computer is used to compare two or more automated systems of records or a system of records with a set of non-Federal records to find individuals who are common to more than one system or set. The procedure includes all of the steps associated with the match, including obtaining the records to be matched, actual use of the computer, administrative and investigative action on the hits, and disposition of the personal records maintained in connection with the match. It should be noted that a single matching program may involve several matches among a number of participants.

Matching Programs do not include the following:

(1) Matches which do not compare a substantial number of records, e.g., comparison of the Department of Education's Defaulted Student Loan data base with the Office of Personnel Management's Federal Employee data base would be covered; comparison of six individual student loan defaultees with the OPM file would not be covered.

(2) Checks on specific individuals to verify data in an application for benefits done reasonably soon after the application is received.

(3) Checks on specific individuals based on information which raises questions about an individual's eligibility for benefits or payments done reasonably soon after the information is received.

(4) Matches done to produce aggregate statistical data without any personal identifiers.

(5) Matches done to support any research or statistical project where the specific data are not to be used to make decisions about the rights, benefits, or privileges of specific individuals.

(6) Matches done by an agency using its own records.

d. A "matching agency" is the Federal agency which actually performs the match.

e. A "source agency" is the Federal agency which discloses records from a system of records to be used in the match. Note that in some circumstances, a source agency may be the instigator and ultimate beneficiary of the matching program, as when an agency lacking computer resources uses another agency to perform the match. The disclosure of records to the matching agency and any subsequent disclosure of "hits" (by either the matching or the source agencies) must be done in accordance with the provisions of paragraph (b) of the Privacy Act.

f. A "hit" is the identification, through a matching program, of a specific individual.

5. *Guidelines for Agencies Participating in Matching Programs*—Agencies should acquire and disclose matching records and conduct matching

programs in accordance with the provisions of this section and the Privacy Act.

a. Disclosing Personal Records for Matching Programs

(1) To Another Federal Agency—source agencies are responsible for determining whether or not to disclose personal records from their systems and for making sure they meet the necessary Privacy Act disclosure provisions when they do. Among the factors source agencies should consider are:

(a) Legal authority for the match;

(b) Purpose and description of the match;

(c) Description of the records to be matched;

(d) Whether the record subjects have consented to the match; or whether disclosure of records for the match would be compatible with the purpose for which the records were originally collected, i.e., whether disclosure under a "routine use" would be appropriate; whether the soliciting agency is seeking the records for a legitimate law enforcement activity—whichever is appropriate; or any other provision of the Privacy Act under which disclosure may be made;

(e) Description of additional information which may be subsequently disclosed in relation to "hits";

(f) Subsequent actions expected of the source (e.g., verification of the identity of the "hits" or follow-up with individuals who are "hits").

(g) Safeguards to be afforded the records involved, including disposition.

If the agency is satisfied that disclosure of the records would not violate its responsibilities under the Privacy Act, it may proceed to make the disclosure to the matching agency. It should ensure that only the minimum information necessary to conduct the match is provided. If disclosure is to be made pursuant to a "routine use" (Section (b)(3) of the Privacy Act), it should ensure that the system of records contains such a use, or it should publish a routine use notice in the **Federal Register**. The agency should also be sure to maintain an accounting of the disclosures pursuant to section (c) of the Privacy Act.

(2) To a Non-Federal Entity—Prior to disclosing records to a non-Federal entity for a matching program to be carried out by that entity, a source agency should, in addition to all of the considerations in 5a(1) above, also make reasonable efforts, pursuant to section (e)(6) of the Privacy Act, to "assure that such records are accurate, complete, timely, and relevant for agency purposes."

b. Written Agreements—Prior to disclosing to either a Federal or non-Federal entity, the source agency should require the matching entity to agree in writing to certain conditions governing the use of the matching file, e.g.: That the matching file will remain the property of the source agency and be returned at the end of the matching program (or destroyed as appropriate); that the file will be used and accessed only to match the file(s) previously agreed to; that it will not be used to extract information concerning "non-hit" individuals for any purpose; and that it will not be duplicated or disseminated within or outside the matching agency unless authorized in writing by the source agency.

c. Performing Matching Programs—

(1) Matching agencies should maintain reasonable administrative, technical and physical security safeguards on all files involved in the matching program.

(2) Matching agencies should insure that they have appropriate systems of records including those containing "hits," and that such systems and any routine uses have been appropriately noticed in the **Federal Register** and reported to OMB and the Congress as appropriate.

d. Disposition of Records—

(1) Matching agencies will return or destroy source matching files (by mutual agreement) immediately after the match.

(2) Records relating to hits will be kept only so long as an investigation, either criminal or administrative, is active and will be disposed of in accordance with the requirements of the Privacy Act and the Federal Records Schedule.

e. Publication Requirements—

(1) Agencies, prior to disclosing records outside the agency, will publish appropriate "routine use" notices in the Federal Register, if necessary.

(2) If the matching program will result in the creation of a new or the substantial alteration of an existing system of records, the agency involved should publish the appropriate Federal Register notice and submit the requisite report to OMB and the Congress pursuant to OMB Circular No. A-108.

f. Reporting Requirements—

(1) As close to the initiation of the matching program as possible, matching agencies shall publish in the Federal Register a brief public notice describing the matching program. The notice should include:

(a) The legal authority under which the match is being conducted;

(b) A description of the matching program including whether the program is one time or continuing, the organizations involved, the purpose(s) for which the program is being conducted, and the procedures to be used in matching and following up on the "hits";

(c) A complete description of the personal records to be matched, including the source(s), system of records identifying data, date(s) and page number(s) of the most recent Federal Register full text publication where appropriate;

(d) The projected start and ending dates of the program;

(e) The security safeguards to be used to protect against unauthorized access or disclosure of the personal records; and

(f) Plans for disposition of the source records and "hits."

Agencies should send a copy of this notice to the Congress and to the Office of Management and Budget at the same time it is sent to the Federal Register.

(2) Agencies should report new or altered systems of records as described in e (2) above as necessary.

(3) Agencies should also be prepared to report on matching programs pursuant to the reporting requirements of either the Privacy Act or the Paperwork Reduction Act. Reports will be solicited by the Office of Information and Regulatory Affairs and will focus on both the protection of individual privacy and the government's effective use of information technology. Reporting instructions will be disseminated to the agencies as part of either the reports required by section (p) of the Privacy Act or section 3514 of Pub. L. 96-511.

g. Use of Contractors—Matching programs should, as far as practicable, be conducted "in-house" by Federal agencies using agency personnel, rather than by contract. When contractors are used, however,

(1) The matching agency should, consistent with subsection (m) of the Privacy Act, cause the requirements of that Act to be applied to the contractor's performance of the matching program. The contract should include the Privacy Act clause required by FPR Amdt. 155, 41 CFR 1-1.337-5;

(2) The terms of the contract should include appropriate privacy and security provisions consistent with policies, regulations, standards and guidelines issued by OMB, GSA, and the Department of Commerce;

(3) The terms of the contrct should preclude the contractor from using, disclosing, copying, or retaining records associated with the matching program for the contractor's own use;

(4) Contractor personnel involved in the matching program should be made explicitly aware of their obligations under the Act, and of these guidelines, agency rules and any special safeguards in relation to each specific match performed.

(5) Any disclosures of records by the agency to the contractor should be made pursuant to a "routine use" (Section (b)(3) of 5 U.S.C. 552a).

6. *Implementation and oversight*— the Office of Management and Budget will oversee the implementation of these Guidelines and shall interpret and advise upon agency proposals and actions within their scope, consistent with section 6 of the Privacy Act.

[FR Doc. 82-13563 Filed 5-18-82; 8:45 am]

BILLING CODE 3110-01-M

Office of Management and Budget

Management of Federal Information Resources

Final Publication of OMB Circular A-130, 50 Fed. Reg. 52730 (December 24, 1985)

OFFICE OF MANAGEMENT AND BUDGET

Management of Federal Information Resources

[Editorial Note: This reprint incorporates a correction that is published in the Federal Register of Monday, January 6, 1986.]

December 12, 1985.

AGENCY: Office of Management and Budget, Executive Office of the President.

ACTION: OMB Circular No. A-130: final publication.

SUMMARY: This Circular provides a general policy framework for management of Federal information resources. The Circular implements provisions of the Paperwork Reduction Act of 1980 as well as other statutes, Executive Orders, and policies concerning general information policy, information technology, privacy, and maintenance of Federal records. The Office of Management and Budget (OMB) published a draft Circular for public comment on March 15, 1985, and received comments and suggestions from the public. This Circular supersedes OMB Circular Nos. A-71, A-90, A-108, and A-121.

DATE: This Circular is effective December 12, 1985.

FOR FURTHER INFORMATION CONTACT: J. Timothy Sprehe, Office of Information and Regulatory Affairs, Room 3235 New Executive Office Building, Office of Management and Budget, Washington, D.C. 20503. Telephone: (202) 395-4814.

SUPPLEMENTARY INFORMATION: The Paperwork Reduction Act of 1980, Pub. L. 96-511, 94 Stat 2812, codified at Chapter 35 of Title 44 of the United States Code, establishes a broad mandate for agencies to perform their information activities in an efficient, effective, and economical manner. Section 3504 of the Act provides authority to the Director, Office of Management and Budget (OMB), to develop and implement uniform and consistent information resources management policies; oversee the development and promote the use of information management principles, standards, and guidelines; evaluate agency information management practices in order to determine their adequacy and efficiency; and determine compliance of such practices with the policies, principles, standards, and guidelines promulgated by the Director.

This Circular implements OMB authority under the Paperwork Reduction Act with respect to section 3504(b), general information policy, section 3504(e), records management, section 3504(f), privacy, and section 3504(g), Federal automatic data processing and telecommunications; the Privacy Act of 1974 (5 U.S.C. 552a); sections 111 and 254 of the Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 759); the Budget and Accounting Act of 1921 (31 U.S.C. 1 et seq.); and Executive Order No. 12046 of March 27, 1978. The Circular complements 5 CFR Part 1320, Controlling Paperwork Burden on the Public, which implements other sections of the Paperwork Reduction Act dealing with controlling the reporting and recordkeeping burden placed on the public.

In addition, the Circular revises and consolidates policy and procedures in five existing OMB directives and rescinds these directives.

A-71—Responsibilities for the Administration and Management of Automatic Data Processing Activities

Transmittal Memorandum No. 1 to Circular No. A-71—Security of Federal Automated Information Systems

A-90—Cooperating with State and Local Governments to Coordinate and Improve Information Systems

A-108—Responsibilities for the Maintenance of Records about Individuals by Federal Agencies

A-121—Cost Accounting, Cost

Recovery, and Interagency Sharing of Data Processing Facilities

Development of the Circular

On September 12, 1983, OMB published a Notice in the Federal Register, 48 FR 40964, announcing development of the OMB Circular on Federal information resources management and soliciting public comment. In response to this notice, OMB received comments from 14 Federal agencies and 39 members of the public. On March 15, 1985, OMB published its draft Circular on the Management of Federal Information Resources (50 FR 10734–10747), inviting the public to comment by May 14, 1985. OMB informally extended the public comment period in order to allow Federal agencies and the public more time to submit their views. By August 1985, OMB had received about 350 letters of comment: 52 percent of these were from the library and academic community, 28 percent were from other members of the public, and 20 percent from Federal agencies and Members of Congress.

Form of the Circular and Addition of Appendix IV

The draft Circular followed the form of a notice of proposed rulemaking, which is to say that the text of the proposed Circular was accompanied by Supplementary Information containing a lengthy analysis of key sections. The analysis explained the management context and philosophy behind the language of the draft Circular.

The Circular also follows the form of a notice of proposed rulemaking. Many who commented on the draft Circular requested that the explanatory contextual materials not be lost when the Circular was published in final form. OMB accepted this recommendation. Accordingly, in addition to the three appendices included in the draft Circular, OMB has added *Appendix I Analysis of Key Sections.* Appendix I contains a revision and expansion of analysis of key sections that accompanied the March 15 draft Circular.

This Supplementary Information section focuses on comments received the March 15 draft Circular and the disposition OMB has made of the comments.

Additional Comment

Because of the perceived seriousnes of deficiencies in the draft Circular of March 15, 1985, several commentators urged that OMB revise the draft, and issue the revision for another round of public comment. With the public notic of September 12, 1983, and March 15, 1985, OMB has twice sought public comment. After analyzing public comment on the March 15 draft and revising the Circular, OMB decided no to accept this recommendation. OMB believes that the Circular as now revised accommodates valid criticisms and objections, that adequate public comment has been sought, and sees little benefit and much delay in a third round of public comment.

Section-by-Section Analysis

Section 1. Purpose

OMB rejected a recommendation tha the phrase "management of Federal information resources" be changed to "management and dissemination of Federal information resources" because the definitions of information resources management and government information already include dissemination within management.

Section 3. Authorities

OMB expanded the citation of the Federal Property and Administrative Services Act to include section 206 in order to reflect Federal telecommunication standards authorities. Executive Order No. 12472, Assignment of National Security and Emergency Preparedness

Telecommunications Functions, has been added to this section.

tion 4. Applicability and Scope

OMB revised this section to include a reference to national security and emergency preparedness telecommunications activities subject to Executive Order No. 12472. One commentator suggested that a general disclaimer be added here stating that the policies apply only where feasible, cost effective, and appropriate in the context of a particular activity. OMB rejected this suggestion because specific disclaimers are included in specific policies and because section 9a(1) assumes that heads of Federal agencies are responsible for managing their information resources in the context of particular activities and agency missions.

Another commentator suggested that the Circular address which guidance will be controlling in the event of inconsistency: the Circular or national security directives. OMB does not believe such inconsistencies exist until shown in specific instances; if they should exist, they should be resolved on an individual basis. Another commentator recommended that this section should make exception for the clusions identified in the Warner iendment in the Department of fense Authorization Act of 1982. OMB believes these exclusions are appropriately treated in the contexts to which they apply, and notes that statute always takes precedence over policy guidance. For clarity, OMB added an explicit reference to this Department of Defense exclusion in the definition of information technology (Section 6h).

Section 6. Definitions

a. Agency. Although no one commented on the definition of "agency," OMB changed the definition because the previous wording was confusing and did not adequately convey that independent regulatory agencies are included within the meaning of the term.

b. Information. One commentator noted that the definition is broader than the definition of the same term in OMB's regulation, 5 CFR Part 1320. The breadth of the definition is due to the fact that the scope of the Circular is broader than the scope of the regulation. Another commentator believed there were major omissions in the definition, e.g., micrographics, printing and publishing, mail and distribution, libraries, voice mmunications, reprographics, diovisual, and manual information stems. OMB believes these are information media, processes, or institutions, rather than information as such, and that the definition as formulated covers them.

c. Government Information. One commentator noted that the definition of "government information" does not include information that may be required to be maintained by a Federal agency, presumably as in Federal recordkeeping requirements imposed upon members of the public (e.g., individuals' tax records). OMB does not intend that such information should be considered government information, nor does the Circular extend to such information except as specifically provided (e.g., Appendix I, Section 3a(1)). Another commentator pointed out that the definition would include information maintained by the legislative and judicial branches of government. While it is true that the definition encompasses information held by the legislative and judicial branches, the Circular applies only to agencies of the executive branch as defined in Section 6a. Another recommended that the definition of government information be restricted only to information created or collected by the Federal Government, and not be extended to information processed, transmitted, disseminated, used, stored, and disposed of by the Federal Government. OMB rejected this recommendation because 44 U.S.C. 3504 clearly applies. for example. to information processing and records management.

Several commentators recommended that the definition should pertain to information "created . . . or disposed of by, *or on behalf of*, the Federal Government." (emphasis added) The intent of the recommendation was to make clear that the Circular's policies applied to all information under government control or sponsorship. irrespective of the information processing agent; that is. to include all information created. collected. processed. transmitted. disseminated. used. stored. or disposed of by government contractors or grantees.

OMB rejected the recommendation for several reasons. First. while agencies doubtless have the choice to treat information created or collected on their behalf as government information. OMB does not intend. except where explicitly stated. that policies in the Circular extend to persons or entities that create. collect. process. transmit. disseminate. use. store. or dispose of information on behalf of the government. Section 4 of the Circular states that the policies apply to executive agencies; Section 3a(1) of Appendix I is an explicit statement of application to Federal contracts. Second. existing and longstanding policy embodied in OMB Circular No. A–110. Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education. Hospitals. and Other Nonprofit Organizations. permits grantees in such institutions to copyright information created or collected under Federal grants. The fact that such information may be copyrighted implies that the information is not government information. because the government may not copyright government information (17 U.S.C. 101 and 105). Third. the courts have held that requests to Federal agencies for release of information under the Freedom of Information Act do not always extend to those performing information activities under grant or contract to a Federal agency; hence. such information is not government information.

Several commentators recommended that government information be subdistinguished. with special definitions being formulated for. and special policy treatment given to. scientific and technical information. statistical information. or printed information. OMB did not accept the recommendation because the Circular is intended to implement the Paperwork Reduction Act. and the Act itself does not distinguish among various kinds of information.

f. and g. Access to Information and Dissemination of Information. The definitions of "access to information" and "dissemination of information." particularly when considered together with Section 8a on information management. drew more comment than any other definitions. Twenty-three persons commented on the definitions. Commentators specially objected to the phrase "upon their request" in the definition of access. They noted that the public may gain access to government information through Freedom of Information Act requests but argued that the Circular makes no provisions to ensure the public knows what information is available or how to obtain the information. They suggested that the tone of the definitions was narrow. negative. and restrictive. and the implications ran contrary to the proper role of government in providing information in a democratic society.

OMB believes that the definitions of access and dissemination. as found in the draft Circular. are sound. In OMB's view. the commentators' objections arose not out of the definitions themselves but out of the uses to which they were put in the draft Circular's policies and their explanation. Accordingly. OMB has made revisions to the policies and to the Analysis of Key Sections (Appendix IV), but has retained the definitions.

i. Information Technology Facility. Several persons pointed out the desirability of standardizing the definition of "information technology facility," as found in the Circular and Appendix II, with "information technology installation," as found in Appendix III. The two terms are retained because they apply to different contexts, and the relationship between the terms is explained in Appendix II, Section 2b.

j. Government Publication. A new term, "government publication," has been defined because a new policy statement pertains to government publications. The definition of the term is taken directly from statute (44 U.S.C. 1901).

Section 7. Basic Considerations and Assumptions

7a and 7b. These statements have been amended and broadened to reflect points raised in comments, namely, that the statements were too narrowly conceived.

Deleted statement. The draft Circular contained the statement: The value of government information to the government is solely a function of the degree to which the information contributes to achieving agencies' missions. Comments concerning this statement alleged that the statement underestimated the value of government information to the government, and failed to take account of other public needs, including those of State and local governments, that are included in the value of information to the Federal Government. Because of other revisions to Section 7, OMB determined the statement was superfluous and deleted it.

7c. A new statement has been inserted in response to many comments that the draft Circular failed to address the positive aspects of government information. The statement incorporates three of the purposes of the Paperwork Reduction Act (44 U.S.C. 3501).

7d. Commentators on this statement objected to the application of cost-benefit analysis to government information activities. Many stated that the benefits of government information cannot be easily calculated and that such information holds more benefits than simply economic. Recalling that the statement is an assumption underlying policy, not itself a policy prescription, OMB notes that the statement does not preclude the existence of benefits other than economic (some of which are enumerated in statement 7b) nor does it necessarily presuppose that benefits can be easily calculated. The statement has been revised to incorporate by reference the purposes of the Paperwork Reduction Act cited in the preceding statement. Ensuring that benefits exceed costs, insofar as these are calculable, is a means to minimizing burden and costs and maximizing usefulness.

7e. Because many commentators misperceived the role accorded the private sector in the draft Circular, a new statement has been added that summarizes the existing policy found in OMB Circular No. A–76, Performance of Commercial Activities. The import of the new statement is simply that policy stated in Circular No. A–76 is and consistently has been assumed to apply to the management of Federal information resources.

7g. Several commentators believed that this statement (formerly statement 7f) did not sufficiently recognize the importance of public disclosure of government information. The statement has been revised to strengthen this point.

One commentary focused on the fact that this statement pertained to the management of Federal agency records rather than management of Federal information resources. Although the Freedom of Information Act and the

Privacy Act pertain only to information in agency records. the statement has been broadened. as a basic assumption. to extend to all information resources. The statement is not limited. either by intention or implication. to paper documents. but may also include electronic records.

7h. The comments on this statement (formerly statement 7g) offered suggestions already provided for in statute or policy: for example. a distinction involving statistical uses of personal information. No changes were made to the statement.

7j and 7k. These statements (formerly statements 7h and 7j) were revised to incorporate language suggested by commentators.

Section 8. Policies

a. Information Management.

(1) and (2). Information Collection and Sharing. Many commentators believed that the formulation of 8a(1) in the draft Circular was too narrow and restrictive. that in fact the Circular would limit the collection of information by Federal agencies more than was intended by the Paperwork Reduction Act. Revised policy statement 8a(1) uses the expression "necessary for the proper performance of the functions of the agency." which is taken directly from the language of the Act (44 U.S.C. 3504(c)(2)). and introduces a requirement for practical utility. also taken from same section of the Act. Some commentators believed the language should be couched in even broader terms. such as information needed by society or the general public. The intent of the Act. however. was to circumscribe. not to broaden. agency discretion to impose information collection and recordkeeping burdens on the public.

Commentators pointed out that many statutes condition the interagency or intergovernmental sharing of information by Federal agencies. Revised policy statement 8a(2) reflects the existence of such conditions. Many also commented on the phrase "or through commercial sources" in this statement. The revision qualifies this phrase and Appendix IV provides further explanatory analysis of the policy.

(3) through (6). Privacy Act and Freedom of Information Act. OMB revised statement 8a(3) to be consistent with statement 8a(1). Statements 8a(4)(b) and 8a(5) have been amended to eliminate ambiguity identified by commentators.

(8) through (12). Information Dissemination. Statements 8a(8) and 8a(9) in the draft Circular received more comments than any other sections. First. as regards the policy that dissemination be either required by law or essential to agency missions. commentators believed these criteria were too negative and restrictive. and failed to emphasize the positive value of government information dissemination and the obligation of the government to inform the citizenry. OMB reformulated both the Circular and the analysis in Appendix IV to emphasize the government's obligations to disseminate information. and to conform more closely to the language and intent of the Paperwork Reduction Act.

Second. commentators challenged the policy that agency information products or services should not duplicate similar products or services "that could reasonably be expected to be provided" by other agencies or the private sector "in the absence of agency dissemination." This policy was believed to be vague and impossible to apply. OMB acknowledges that "could reasonably be expected" is an inadequate formulation and has accordingly revised the policy. However. the general stricture against duplicating products or services that are or would otherwise be provided by other government or private sector organizations has been retained because the criterion of non-duplication for government information resources is clearly stated in the Act: if it is clear that an agency's dissemination would duplicate that of a private organization, the same considerations apply. The analysis in Appendix IV has been expanded to clarify the meaning of this policy.

Third, many commentators suggested that agencies provide adequate notice and opportunity for public comment before terminating information products and services. OMB believes this suggestion has merit as applied to any significant termination, and has incorporated the idea in the revised policy and Appendix IV. With respect to the non-duplication criterion, OMB added the provision that adequate notice should be provided before *initiating* new information products and services. This provision will allow other agencies and private sector interests to inform the initiating agency if a new product or service will duplicate their product or service, and hence satisfies the intent of the draft Circular's language. Further explanation of this policy is also found in Appendix IV.

Fourth, commentators questioned the language in the draft Circular's statement 8a(9)(a) requiring that agencies disseminate information products and services "in a manner that reasonably ensures the information will reach the members of the public the agency is responsible for reaching." OMB has slightly altered the language while providing a fuller explanation in Appendix IV.

Fifth, commentators challenged the language in the draft Circular's statement 8a(9)(b) that dissemination should be accomplished "in the manner most cost effective for the government, including placing maximum feasible reliance on the private sector . . ." OMB has retained this language, but added a reference to OMB Circular No. A–76 which provides the context for the policy and conditions that address most points raised by commentators. For example, OMB Circular No. A–76 distinguishes between functions that are inherently governmental in nature, and hence should be performed by government employees, and functions that are commercial in nature and may be performed by the private sector. Again, Appendix IV contains additional discussion of the role of the private sector in disseminating government information products and services.

Sixth, commentators criticized the reference to user charges in the draft Circular's statement 8a(9)(c). OMB has retained the draft Circular's language, because OMB Circular No. A–25 already takes account of objections raised. For example, some pointed out that the costs of assessing user charges can be greater than the revenues yielded from the charges; Circular No. A–25 provides for this contingency. Also, commentators failed to note that this policy statement requires user charges only for costs of dissemination of government information, not for creation, collection, processing, and transmission of the information. User charges also are more fully discussed in Appendix IV.

Seventh, in response to comments OMB added new language requiring that agencies establish procedures for ensuring compliance with 44 U.S.C. 1902 concerning Federal depository libraries. Many commentators referenced the Federal depository library program as an existing institutional mechanism for ensuring that much government information is disseminated to and actually reaches the general public. They believed the Circular should strengthen the depository library system. Because OMB agreed with the comments, and since the law provides that government publications be made available to the depository libraries, OMB accepted this recommendation: the Circular requires agencies to make government publications available to the depository library system, and Appendix IV elaborates this point.

b. Information Systems and Information Technology Management.

(1) through (3). One commentator recommended that these policies be expanded to include a requirement that agencies document a 10 percent return on information technology investments. OMB rejected this recommendation as being too specific for inclusion in a general policy statement.

(4) and (5). Several commentators recommended that these statements also include provision for cost effectiveness and meeting specific agency needs. OMB revised the policy to reflect this recommendation and also expanded on the point in Appendix IV.

(6) and (7). Commentators noted that the desirability of competition is sometimes conditioned by the fact that competitive processes unnecessarily slow down procurement of information technology, and that other requirements, such as the need for compatibility, may legitimately limit competitive processes. OMB recognizes the validity of these points but believes they may be taken into account without altering the policy statements.

(8). Commentators pointed out that agencies have some legitimate needs for customized software, and that acquisition of off-the-shelf software carries its own risks, such as uncertainty over continued maintenance. OMB believes that these quite meritorious considerations do not invalidate the policy statement as it stands.

(9). Several commentators said that the term "interconnectivity" has specific and limited meaning in telecommunications, and that "necessary compatibility" would better convey the meaning intended. OMB revised the policy to reflect these comments and expanded on the point in Appendix IV.

(14). Commentators recommended that the background materials for this policy statement be strengthened to stress the positive values of standards and that national security directives be referenced. OMB revised Appendix IV to reflect this recommendation and the fact that the General Services Administration issues Federal Telecommunications Standards.

(15). Several agencies commented that what may be cost effective for individual program managers may not be cost effective for the agency as a whole and that the policy as drafted places the burden of proof on the agency rather than the program manager. OMB recognizes the potential conflict between agency and program cost effectiveness but believes the burden of proof belongs with the agency to demonstrate that its arrangements for information technology facilities and services are the most cost effective for agency programs.

One commentator recommended that agency information technology facilities be permitted to charge users market rates rather than cost recovery, because cost recovery will not be competitive with market rates. OMB's view is that, if cost recovery is not competitive with market rates, this is prima facie evidence that agency information technology facility arrangements are not cost effective, and that program managers should be freed from mandatory use of such arrangements.

(16). Agencies commented that cost recovery systems may be expensive and should not be required where there is no clear benefit to such systems. OMB recognizes this problem and has revised Appendix II, but not the policy statement, to cover this contingency.

Section 9. Assignment of Responsibilities

Some commentators on this section objected to a perceived concentration in OMB of decisionmaking power over Federal information resources, believing that the Circular places program decisions in OMB's hands. OMB notes first that the Paperwork Reduction Act requires the director of OMB to develop and implement Federal information policies, principles, standards, and guidelines (44 U.S.C. 3504). Second, the Circular states, and Appendix IV emphasizes, that program decisionmaking for Federal information resources belongs with the heads of agencies, operating within the policy framework set forth by OMB.

Several commentators recommended that this section include a statement concerning the Federal depository libraries. OMB believes the addition of statement 8a(12)(b) regarding the depository libraries covers this recommendation. Also, OMB did not accept a commentator's recommendation that certain responsibilities be assigned to Federal libraries; such libraries are subunits of agencies and the Circular assigns responsibilities only at the agency level.

Several commentators recommended that OMB assign responsibility for the Office of Personnel Management to develop and implement occupational and position standards for information resources managers. OMB does not believe management of Federal information resources requires establishing new job titles and series. Furthermore, such establishment would require legislation and could not be legally accomplished through an OMB Circular.

Several Federal agencies requested that various statements assigning responsibilities be revised to include reference to their statutory or regulatory responsibilities. OMB reviewed these requests and determined that revisions were unnecessary. The Circular presupposes the existence of, and compliance with, other applicable laws and regulations.

a(6). In response to comments OMB revised this statement more accurately to reflect agency responsibilities for Federal records management.

a(9). OMB inserted a reference to convey that the "senior official" is identical to the provision of 44 U.S.C. 3506(b).

b(1). At the suggestion of a commentator, OMB substituted "information resources management policy" for "information policy" because the latter term is not defined or used elsewhere in the Circular.

e(4). One commentator noted that assigning GSA responsibility for providing guidelines and regulations on the *use* of information technology contravenes the Brooks Act (40 U.S.C. 759(g)). OMB revised the statement to reflect this point.

h(12). OMB revised the statement in the same manner as statement 9b(1).

Appendix I

Several commentators expressed concern that promulgation of the appendix would rescind the OMB "Guidelines on Implementing the Privacy Act," and others suggested combining the appendix with all guidance OMB has issued on the Act. OMB did not intend to replace existing guidance with the appendix. The appendix replaces only the procedural requirements contained in OMB Circular No. A-108. All other guidance remains in force, and OMB has revised the appendix to make that clear. OMB declined to follow the suggestion that the appendix and other guidance be combined, because the purposes of each issuance are different.

Other commentators pointed out inconsistencies in the timing of various reviews required by the Circular's different appendices; suggested clarifying by examples what constitutes a "minor change to a system of records"; suggested changing the timing of the review of section (m) contracts to more frequently than every five years, since review is conducted on a random sample basis and should not prove overly burdensome; and suggested that the first triennial review of routine uses be commenced immediately upon issuance of the Circular. OMB revised the appendix to reflect these comments.

OMB added a requirement for an annual review of all systems notices: added certain data collection requirements for the annual report pursuant to section (p): and dropped a requirement for the Office of the Federal Register to provide OMB with a consolidated list of changes to agencies' systems of records.

Appendix II·

Several commentators expressed concern about the cost effectiveness of requiring detailed accounting and chargeback for use of relatively small information technology facilities. OMB agreed with these comments. The intent of Appendix II is to encourage cost effective behavior in the management of Federal information technology resources. In revising the Appendix OMB raised the threshold so that the Appendix applies only to facilities having obligations in excess of $3 million per year.

A number of commentators pointed out that the Appendix does not allow facilities to justify resource requests based upon sharing, except in unusual circumstances. OMB revised the Appendix to clarify that this restriction is included because the normal practice is for users of a facility to include resource requests for the amount of technology use in their budget and appropriation requests.

Several commentators believed that requiring full costs to be recovered from all users within an agency would not be cost effective. OMB disagreed with this viewpoint and retained the draft Circular's formulation. Viable management of a large information technology facility requires that managers know the amount of resources devoted to each user when providing services. Furthermore, effective management of the use of information technology requires that the user have responsibility for and control over the resources consumed by use of the facility.

Finally, a number of commentators questioned the advisability of giving users of significant new applications primary responsibility for selecting which facility will support the applications. OMB disagreed and retained the draft Circular's formulatio When users are dependent on effective technology support to perform their function, control over selection of facility is essential and consistent with holding users responsible for producing their government information products.

Appendix III

Several commentators asked for clarification of the relationship betwee Appendix III and OMB Circular No. A–123. The Appendix itself relates certai of its requirements to requirements in Circular No. A–123 (e.g., annual reporting of security weaknesses as material weaknesses, and a separate assurance of the security of agency automated information systems in the annual internal control report required by Circular No. A–123). Beyond these specific requirements, application controls specified in the Appendix should be verified in vulnerability assessments and internal control reviews of the functional area supported by the application. Installation controls specified in the Appendix should be reviewed as one of the generic controls of an information technology unit itself.

Several commentators asked how the Circular relates to OMB Circular No. A–127, Financial Management Systems. The evaluation and reporting requirements for the systems integrity objective contained in OMB Circular No. A–127 may be met by fulfilling the evaluation and reporting requirements contained in Appendix III to this Circular and in OMB Circular No. A–123.

Several commentators also expressed sion about the relation between dix III and security of national security information. OMB revised Appendix III to clarify that the Appendix provides a minimal set of requirements for the security of Federal automated information systems; required agencies to also incorporate additional requirements for security of information classified for national security purposes; and clarified central agency responsibilities related to national security information.

Several commentators suggested that Appendix III use the term "information technology facility" for consistency with the Circular and Appendix II. The term "information technology installation," as used in Appendix III, includes information technology facilities as well as small localized processing capabilities. OMB retained the term "information technology installation" in order to emphasize the importance of assuring adequate security of such smaller systems as well as of larger facilities. OMB expects that management processes for assuring a proper level of security at small installations will be less detailed and resource intensive than at larger ies.

eral commentators expressed concern that personnel security responsibilities in the Appendix focused only on screening employees. They pointed out that other personnel activities, such as separation of duties and actions relating to employees leaving an agency, may be more cost effective security measures. OMB agreed with these comments and clarified the language concerning agency personnel programs so as not to limit agency personnel programs to employment screening of personnel, while still requiring employment screening as one tool in agency security programs.

Circular No. A-130

To the Heads of Executive Departments and Establishments

December 12, 1985.

Subject: Management of Federal Information Resources

1. *Purpose:* This Circular establishes policy for the management of Federal information resources. Procedural and analytic guidelines for implementing specific aspects of these policies are included as appendices.

escissions: This Circular rescinds Circulars No. A-71, A-90, A-108, and A-121, and all Transmittal Memoranda to those circulars.

3. *Authorities:* This Circular is issued pursuant to the Paperwork Reduction Act of 1980 (44 U.S.C. 35); the Privacy Act of 1974 (5 U.S.C. 552a), sections 111 and 206 of the Federal Property and Administrative Services Act of 1949 as amended (40 U.S.C. 759 and 487, respectively), the Budget and Accounting Act of 1921 as amended (31 U.S.C. 11), Executive Order No. 12046 of March 27, 1978, and Executive Order No. 12472 of April 3, 1984.

4. *Applicability and Scope:*

a. The policies in this Circular apply to the information activities of all agencies of the executive branch of the Federal Government.

b. Information classified for national security purposes should also be handled in accordance with the appropriate national security directives. National security emergency preparedness activities should be conducted in accordance with Executive Order No. 12472.

5. *Background:* The Paperwork Reduction Act establishes a broad mandate for agencies to perform their information management activities in an efficient, effective, and economical manner. To assist agencies in an integrated approach to information resources management, the Act requires that the Director of the Office of

Management and Budget (OMB) develop and implement uniform and consistent information resources management policies: oversee the development and promote the use of information management principles, standards, and guidelines: evaluate agency information management practices in order to determine their adequacy and efficiency: and determine compliance of such practices with the policies, principles, standards, and guidelines promulgated by the Director.

6. *Definitions:* As used in this Circular—

a. The term "agency" means any executive department, military department, government corporation, government controlled corporation, or other establishment in the executive branch of the government, or any independent regulatory agency. Within the Executive Office of the President, the term includes only the Office of Management and Budget and the Office of Administration.

b. The term "information" means any communication or reception of knowledge such as facts, data, or opinions, including numerical, graphic, or narrative forms, whether oral or maintained in any medium, including computerized data bases, paper, microform, or magnetic tape.

c. The term "government information" means information created, collected, processed, transmitted, disseminated, used, stored, or disposed of by the Federal Government.

d. The term "information system" means the organized collection, processing, transmission, and dissemination of information in accordance with defined procedures, whether automated or manual.

e. The term "major information system" means an information system that requires special continuing management attention because of its importance to an agency mission: its high development, operating or maintenance costs; or its significant impact on the administration of agency programs, finances, property, or other resources.

f. The term "access to information" refers to the function of providing to members of the public, upon their request, the government information to which they are entitled under law.

g. The term "dissemination of information" refers to the function of distributing government information to the public, whether through printed documents, or electronic or other media. "Dissemination of information" does not include intra-agency use of information, interagency sharing of information, or responding to requests for "access to information."

h. The term "information technology" means the hardware and software used in connection with government information, regardless of the technology involved, whether computers, telecommunications, micrographics, or others. For the purposes of this Circular, automatic data processing and telecommunications activities related to certain critical national security missions, as defined in 44 U.S.C. 3502(2) and 10 U.S.C. 2315, are excluded.

i. The term "information technology facility" means an organizationally defined set of personnel, hardware, software, and physical facilities, a primary function of which is the operation of information technology.

j. The term "information resources management" means the planning, budgeting, organizing, directing, training, and control associated with government information. The term encompasses both information itself and the related resources, such as personnel, equipment, funds, and technology.

k. The term "government publication" means informational matter which is published as an individual document at government expense, or as required by law.

Other definitions specific to the subjects of the appendices appear in the appendices.

7. *Basic Considerations and Assumptions:*

a. The Federal Government is the largest single producer, consumer, and disseminator of information in the United States. Because of the size of the government's information activities, the dependence of government information activities upon the public's cooperation, and the value of government information to the entire Nation, the management of Federal information resources is an issue of continuing importance to the public and to the government itself.

b. Government information is a valuable national resource. It provides citizens with knowledge of their government, society, and economy—past, present, and future; is a means to ensure the accountability of government; is vital to the healthy performance of the economy; is an essential tool for managing the government's operations; and is itself a commodity often with economic value in the marketplace.

c. The free flow of information from the government to its citizens and vice versa is essential to a democratic society. It is also essential that the government minimize the Federal paperwork burden on the public, minimize the cost of its information activities, and maximize the usefulness of government information.

d. In order to minimize the cost and maximize the usefulness of government information activities, the expected public and private benefits derived from government information, insofar as they are calculable, should exceed the public and private costs of the information.

e. Although certain functions are inherently governmental in nature, being so intimately related to the public interest as to mandate performance by Federal employees, the government should look first to private sources, where available, to provide the commercial goods and services needed by the government to act on the public's behalf, particularly when cost comparisons indicate that private performance will be the most economical.

f. The use of up-to-date information technology offers opportunities to improve the management of government programs, and access to, and dissemination of, government information.

g. Because the public disclosure of government information is essential to the operation of a democracy, the public's right of access to government information must be protected in the management of Federal information resources.

h. The individual's right to privacy must be protected in Federal Government information activities involving personal information.

i. The open and efficient exchange of government scientific and technical information, subject to applicable national security controls and proprietary rights others may have in such information, fosters excellence in scientific research and the effective use of Federal research and development funds.

j. The value of preserving government records is a function of the degree to which preservation protects the legal and financial rights of the government or its citizens, and provides an official record of Federal agency activities for agency management, public accountability, and historical purposes.

k. Federal Government information resources management policies and activities can affect, and be affected by, the information policies and activities of other nations.

8. *Policies:*

a. *Information Management.* Agencies shall:

(1) Create or collect only that informtion necessary for the proper performance of agency functions and that has practical utility, and only after

planning for its processing, transmission, dissemination, use, storage, and disposition:

(2) Seek to satisfy new information needs through legally authorized interagency or intergovernmental sharing of information, or through commercial sources, where appropriate, before creating or collecting new information:

(3) Limit the collection of individually identifiable information and proprietary information to that which is legally authorized and necessary for the proper performance of agency functions:

(4) Maintain and protect individually identifiable information and proprietary information in a manner that precludes:

(a) Unwarranted intrusion upon personal privacy (see Appendix I); and

(b) Violation of confidentiality;

(5) Provide individuals with access to, and the ability to amend errors in, systems of records, consistent with the Privacy Act:

(6) Provide public access to government information, consistent with the Freedom of Information Act:

(7) Ensure that agency personnel are trained to safeguard information resources:

(8) Disseminate information, as required by law, describing agency organization, activities, programs, meetings, systems of records, and other information holdings, and how the public may gain access to agency information resources:

(9) Disseminate such information products and services as are:

(a) Specifically required by law; or

(b) Necessary for the proper performance of agency functions, provided that the latter do not duplicate similar products or services that are or would otherwise be provided by other government or private sector organizations:

(10) Disseminate significant new, or terminate significant existing, information products and services only after providing adequate notice to the public:

(11) Disseminate such government information products and services:

(a) In a manner that ensures that members of the public whom the agency has an obligation to reach have a reasonable ability to acquire the information:

(b) In the manner most cost effective for the government, including placing maximum feasible reliance on the private sector for the dissemination of the products or services in accordance with OMB Circular No. A–76; and

(c) So as to recover costs of disseminating the products or services through user charges, where appropriate, in accordance with OMB Circular No. A–25:

(12) Establish procedures for:

(a) Reviewing periodically the continued need for and manner of dissemination of the agency's information products or services; and

(b) Ensuring that government publications are made available to depository libraries as required by law.

b. *Information Systems and Information Technology Management.* Agencies shall:

(1) Establish multiyear strategic planning processes for acquiring and operating information technology that meet program and mission needs, reflect budget constraints, and form the bases for their budget requests:

(2) Establish systems of management control that document the requirements that each major information system is intended to serve; and provide for periodic review of those requirements over the life of the system in order to determine whether the requirements continue to exist and the system continues to meet the purposes for which it was developed:

(3) Make the official whose program an information system supports responsible and accountable for the products of that system:

(4) Meet information processing needs through interagency sharing and from commercial sources, when it is cost effective, before acquiring new information processing capacity;

(5) Share available information processing capacity with other agencies to the extent practicable and legally permissible;

(6) Acquire information technology in a competitive manner that minimizes total life cycle costs;

(7) Ensure that existing and planned major information systems do not unnecessarily duplicate information systems available from other agencies or from the private sector;

(8) Acquire off-the-shelf software from commercial sources, unless the cost effectiveness of developing custom software is clear and has been documented;

(9) Acquire or develop information systems in a manner that facilitates necessary compatibility;

(10) Assure that information systems operate effectively and accurately;

(11) Establish a level of security for all agency information systems commensurate with the sensitivity of the information and the risk and magnitude of loss or harm that could result from improper operation of the information systems (See Appendix III);

(12) Assure that only authorized personnel have access to information systems;

(13) Plan to provide information systems with reasonable continuity of support should their normal operations be disrupted in an emergency;

(14) Use Federal Information Processing and Telecommunications Standards except where it can be demonstrated that the costs of using a standard exceed the benefits or the standard will impede the agency in accomplishing its mission;

(15) Not require program managers to use specific information technology facilities or services unless it is clear and is convincingly documented, subject to periodic review, that such use is the most cost effective method for meeting program requirements;

(16) Account for the full costs of operating information technology facilities and recover such costs from government users as provided in Appendix II;

(17) Not prescribe Federal information system requirements that unduly restrict the prerogatives of heads of State and local government units;

(18) Seek opportunities to improve the operation of government programs or to realize savings for the government and the public through the application of up-to-date information technology to government information activities.

9. *Assignment of Responsibilities:*

a. *All Federal Agencies.* The head of each agency shall:

(1) Have primary responsibility for managing agency information resources;

(2) Ensure that the information policies, principles, standards, guidelines, rules, and regulations prescribed by OMB are implemented appropriately within the agency;

(3) Develop internal agency information policies and procedures and oversee, evaluate, and otherwise periodically review agency information resources management activities for conformity with the policies set forth in this Circular;

(4) Develop agency policies and procedures that provide for timely acquisition of required information technology;

(5) Maintain an inventory of the agencies' major information systems and information dissemination programs;

(6) Create, maintain, and dispose of a record of agency activities in accordance with the Federal Records Act of 1950, as amended;

(7) Identify to the Director, OMB, statutory, regulatory, and other impediments to efficient management of Federal information resources and

recommend to the Director legislation, policies, procedures, and other guidance to improve such management;

(8) Assist OMB in the performance of its functions under the Paperwork Reduction Act, including making services, personnel, and facilities available to OMB for this purpose to the extent practicable;

(9) Appoint a senior official, as required by 44 U.S.C. 3506(b), who shall report directly to the agency head, to carry out the responsibilities of the agency under the Paperwork Reduction Act. The head of the agency shall keep the Director, OMB, advised as to the name, title, authority, responsibilities, and organizational resources of the senior official. For purposes of this paragraph military departments and the Office of the Secretary of Defense may each appoint one official.

b. *Department of State.* The Secretary of State shall:

(1) Advise the Director, OMB, on the development of United States positions and policies on international information policy issues affecting Federal Government information activities and ensure that such positions and policies are consistent with Federal information resources management policy;

(2) Ensure, in consultation with the Secretary of Commerce, that the United States is represented in the development of international information technology standards, and advise the Director, OMB, of such activities.

c. *Department of Commerce.* The Secretary of Commerce shall:

(1) Develop and issue Federal Information Processing Standards and guidelines necessary to ensure the efficient and effective acquisition, management, security, and use of information technology;

(2) Advise the Director, OMB, on the development of policies relating to the procurement and management of Federal telecommunications resources;

(3) Provide OMB and the agencies with scientific and technical advisory services relating to the development and use of information technology;

(4) Conduct studies and evaluations concerning telecommunications technology, and concerning the improvement, expansion, testing, operation, and use of Federal telecommunications systems and advise the Director, OMB, and appropriate agencies of the recommendations that result from such studies;

(5) Develop, in consultation with the Secretary of State and the Director, OMB, plans, policies, and programs relating to international telecommunications issues affecting government information activities;

(6) Identify needs for standardization of telecommunications and information processing technology, and develop standards, in consultation with the Secretary of Defense and the Administrator of General Servcies, to ensure efficient application of such technology;

(7) Ensure that the Federal Government is represented in the development of national and, in consultation with the Secretary of State, international information technology standards, and advise the Director, OMB, of such activities.

d. *Department of Defense.* The Secretary of Defense shall develop, in consultation with the Administrator of General Services, uniform Federal telecommunications standards and guidelines to ensure national security, emergency preparedness, and continuity of government.

e. *General Services Administration.* The Administrator of General Services shall:

(1) Advise the Director, OMB, and agency heads on matters affecting the procurement of information technology;

(2) Coordinate and, when required, provide for the purchase, lease, and

maintenance of information technology required by Federal agencies;

(3) Develop criteria for timely procurement of information technology and delegate procurement authority to agencies that comply with the criteria;

(4) Provide guidelines and regulations for Federal agencies, as authorized by law, on the acquisition, maintenance, and disposition of information technology;

(5) Develop policies and guidelines that facilitate the sharing of information technology among agencies as requried by this Circular;

(6) Review agencies' information resources management activities to meet the objectives of the triennial reviews required by the Paperwork Reduction Act and report the results to the Director, OMB;

(7) Manage the Automatic Data Processing Fund and the Federal Telecommunications Fund in accordance with the Federal Property and Administrative Services Act, as amended;

(8) Establish procedures for approval, implementation, and dissemination of Federal telecommunications standards and guidelines and for implementation of Federal Information Processing Standards.

f. *Office of Personnel Management.* The Director, Office of Personnel Management, shall:

(1) Develop and conduct training programs for Federal personnel on information resources management, including end user computing;

(2) Evaluate periodically future personnel management and staffing requirements for Federal information resources management;

(3) Establish personnel security policies and develop training programs for Federal personnel associated with the design, operation, or maintenance of information systems.

g. *National Archives and Records Administration.* The Archivist of the United States shall:

(1) Administer the Federal records management program in accordance with the National Archives and Records Act;

(2) Assist the Director, OMB, in developing standards and guidelines relating to the records management program.

h. *Office of Management and Budget.* The Director of the Office of Management and Budget shall:

(1) Provide overall leadership and coordination of Federal information resources management within the executive branch;

(2) Serve as the President's principal adviser on procurement and management of Federal telecommunications systems, and develop and establish policies for procurement and management of such systems;

(3) Issue policies, procedures, and guidelines to assist agencies in achieving integrated, effective, and efficient information resources management;

(4) Initiate and review proposals for changes in legislation, regulations, and agency procedures to improve Federal information resources management;

(5) Review and approve or disapprove agency proposals for collection of information from the public, as defined in 5 CFR 1320.7;

(6) Develop and publish annually, in consultation with the Administrator of General Services, a five-year plan for meeting the information technology needs of the Federal government;

(7) Evaluate agencies' information resources management and identify cross-cutting information policy issues through the review of agency information programs, information collection budgets, information technology acquisition plans, fiscal budgets, and by other means;

(8) Provide policy oversight for the Federal records management function conducted by the National Archives and Records Administration and coordinate

records management policies and programs with other information activities;

(9) Review, with the advice and assistance of the Administrator of General Services, selected agencies information resources management activities to meet the objectives of the triennial reviews required by the Paperwork Reduction Act;

(10) Review agencies' policies, practices, and programs pertaining to the security, protection, sharing, and disclosure of information, in order to ensure compliance with the Privacy Act and related statutes;

(11) Resolve information technology procurement disputes between agencies and the General Services Administration pursuant to Section 111 of the Federal Property and Administrative Services Act;

(12) Review proposed U.S. government position and policy statements on international issues affecting Federal Government information activities and advise the Secretary of State as to their consistency with Federal information resources management policy.

10. *Oversight.* The Director, OMB, wil use information technology planning reviews, fiscal budget reviews, information collection budget reviews, management reviews, GSA reviews of agency information resources management activities, and such other measures as he deems necessary to evaluate the adequacy and efficiency of each agency's information resources management and compliance with this Circular.

11. *Effective Date.* This Circular is effective upon publication (December 12, 1985).

12. *Inquiries.* All questions or inquiries should be addressed to Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, D.C. 20503. Telephone: (202) 395-3287.

13. *Sunset Review Date.* This Circular shall have an independent policy review to ascertain its effectiveness three years from the date of issuance.

James C. Miller III,
Director.

Appendix I: Federal Agency Responsibilities for Maintaining Records about Individuals
Appendix II: Cost Accounting, Cost Recovery and Interagency Sharing of Information Technology Facilities
Appendix III: Security of Federal Automated Information Systems
Appendix IV: Analysis of Key Sections

Darrell A. Johnson,
Assistant Director for Administration.

Appendix I to OMB Circular No. A-130—Federal Agency Responsibilities for Maintaining Records About Individuals

1. *Purpose and Scope.*

This Appendix describes agency responsibilities for implementing the Privacy Act of 1974, 5 U.S.C. 552a as amended (hereinafter "the Act"). It applies to all agencies subject to the Act. The Appendix constitutes a revision to procedures formerly contained in OMB Circular No. A-108, now rescinded. Note that this Appendix does *not* rescind other guidance OMB has issued to help agencies interpret the Privacy Act's provisions, e.g., Privacy Act Guidelines (40 FR 28949-28978, July 9, 1975), or Guidance for Conducting Matching Programs (47 FR 21656-21658, May 19, 1982).

2. *Definitions.*

a. The terms "agency," "individual," "maintain," "record," "system of records," and "routine use," as used in this Appendix, are defined in the Act (5 U.S.C. 552a(a)). The definition of "agency" in the Act differs somewhat from the definition in the Circular.

b. The term "minor change to a system of records" means a change that does not significantly change the system; that is, does not affect the character or purpose of the system and does not affect the ability of an individual to gain cess to his or her record or to any rmation pertaining to him or her ich is contained in the system: e.g., changing the title of the system manager.

3. *Assignment of Responsibilities.*

a. *All Federal Agencies.* In addition to meeting the agency requirements contained in the Act, and the specific reporting requirements detailed in this Appendix, the head of each agency shall ensure that the following reviews are conducted as often as specified below, and be prepared to report to the Director, OMB, the results of such reviews and the corrective action taken to resolve problems uncovered. The head of each agency shall:

(1) *Section (m) Contracts.* Review every two years a random sample of agency contracts that provide for the maintenance of a system of records on behalf of the agency to accomplish an agency function, in order to ensure that the wording of each contract makes the provisions of the Act apply. (5 U.S.C. 552a(m)(1))

(2) *Recordkeeping Practices.* Review annually agency recordkeeping and disposal policies and practices in order to assure compliance with the Act.

(3) *Routine Use Disclosures.* Review ry three years the routine use losures associated with each system records in order to ensure that the recipient's use of such records continues to be compatible with the purpose for which the disclosing agency originally collected the information. The first such review should commence immediately upon the issuance of this Appendix.

(4) *Exemption of Systems of Records.* Review every three years each system of records for which the agency has promulgated exemption rules pursuant to Section (j) or (k) of the Privacy Act in order to determine whether such exemption is still needed.

(5) *Matching Programs.* Review annually each ongoing matching program in which the agency has participated during the year, either as a ource or as a matching agency, in order to ensure that the requirements of the Act, the OMB Matching Guidelines, and the OMB Model Control System and hecklist have been met.

(6) *Privacy Act Training.* Review annually agency training practices in order to ensure that all agency personnel are familiar with the requirements of the Act, with the agency's implementing regulation, and with any special requirements that their ific jobs entail.

) *Violations.* Review annually the ions of agency personnel that have resulted either in the agency being found civilly liable under Section (g) of the Act, or an employee being found criminally liable under the provisions of Section (i) of the Act, in order to determine the extent of the problem and to find the most effective way to prevent recurrences of the problem.

(8) *Systems of Records Notices.* Review annually each system of records notice to ensure that it accurately describes the system. Where minor changes are needed, ensure that an amended notice is published in the Federal Register. Agencies may choose to make one annual comprehensive publication consolidating such minor changes. This requirement is distinguished from and in addition to the requirement to report to OMB and the Congress major changes to systems of records and to publish those changes in the Federal Register (see paragraph 4b of this Appendix).

b. *Department of Commerce.* The Secretary of Commerce shall, consistent with guidelines issued by the Director, OMB, develop and issue standards and guidelines for assuring the security of information protected by the Privacy Act in automated information systems.

c. *General Services Administration.* The Administrator of General Services shall, consistent with guidelines issued by the Director, OMB, issue instructions on what agencies must do in order to comply with the requirements of Section (m) of the Act when contracting for the operation of a system of records to accomplish an agency purpose.

d. *Office of Personnel Management.* The Director of the Office of Personnel Management shall, consistent with guidelines issued by the Director, OMB:

(1) Develop and maintain government-wide standards and procedures for civilian personnel information processing and recordkeeping directives to assure conformance with the Act.

(2) Develop and conduct training programs for agency personnel, including both the conduct of courses in various substantive areas (e.g., legal, administrative, information technology) and the development of materials that agencies can use in their own courses. The assignment of this responsibility to OPM does not affect the responsibility of individual agency heads for developing and conducting training programs tailored to the specific needs of their own personnel.

e. *National Archives and Records Administration.* The Archivist of the United States shall, consistent with guidelines issued by the Director, OMB:

(1) Issue instructions on the format of the Agency notices and rules required to be published under the Act.

(2) Compile and publish annually the rules promulgated under 5 U.S.C. 552a(f) and agency notices published under 5 U.S.C. 552a(e)(4) in a form available to the public.

(3) Issue procedures governing the transfer of records to Federal Records Centers for storage, processing, and servicing pursuant to 44 U.S.C. 3103. For purposes of the Act, such records are considered to be maintained by the agency that deposited them. The Archivist may disclose deposited records only according to the access rules established by the agency that deposited them.

f. *Office of Management and Budget.* The Director of the Office of Management and Budget will:

(1) Issue guidelines and directives to the agencies to implement the Act.

(2) Assist the agencies, at their request, in implementing their Privacy Act programs.

(3) Review the new and altered system reports agencies submit pursuant to Section (o) of the Act.

(4) Compile the annual report of the President to the Congress in accordance with Section (p) of the Act.

4. *Reporting Requirements.*

a. *Privacy Act Annual Reports.* To provide the necessary information for the annual report of the President, agencies shall submit a Privacy Act Annual Report to the Director, OMB, covering their Privacy Act activities for the calendar year. The exact format and timing of the report will be established by the Director, OMB (5 U.S.C. 552a(p)); but, agencies should, at a minimum collect, and be prepared to report the following data on a calendar year basis:

(1) Total number of active systems of records and changes to that population during the year, e.g., publications of new systems, additions and deletions of routine uses, exemptions, automation of record systems.

(2) Public comments received on agency publications and implementation activities.

(3) Number of requests from individuals for access to records about themselves in systems of records *that cited the Privacy Act in support of their requests.*

(4) Number granted in whole or part, denied in whole, and for which no record was found.

(5) Number of amendment requests from individuals to amend records about them in systems of records *that cited the Privacy Act in support of their requests.*

(6) Number granted in whole or part, denied in whole, and for which no record was found.

(7) Number of appeals of access and amendment denials and the results of such appeals.

(8) Number of instances in which individuals litigated the results of appeals of access or amendment, and the results of such litigation.

(9) Number and description of matching programs participated in either as source or matching agency.

b. *New and Altered System Reports.* The Act requires agencies to publish notices in the Federal Register describing new or altered systems of records, and to submit reports on these systems to the Director, OMB, and to the Congress.

(1) *Altered System of Records.* Minor changes to systems of records need not be reported. For example, a change in the designation of the system manager due to a reorganization would not require a report, so long as an individual's ability to gain access to his or her records is not affected. Other examples include changing applicable safeguards as a result of a risk analysis, deleting a routine use when there is no longer a need for the authorized disclosure. These examples are not intended to be all-inclusive.

The following changes are those for which a report is required:

(a) An increase or change in the number or types of individuals on whom records are maintained. For example, a decision to expand a system that originally covered only residents of public housing in major cities to cover such residents nationwide would require a report. Increases attributable to normal growth should not be reported.

(b) A change that expands the types or categories of information maintained. For example, a personnel file that has been expanded to include medical records would require a report.

(c) A change that alters the purpose for which the information is used.

(d) A change to equipment configuration (either hardware or software) that creates substantially greater access to the records in the system. For example, locating interactive terminals at regional offices for accessing a system formerly accessible only at the headquarters would require a report.

(e) The addition of an exemption (pursuant to Section (j) or (k) of the Act). Note that, in submitting a rulemaking for an exemption as part of a report of a new or altered system, agencies will meet the reporting requirements of Executive Order No. 12291 and need not make a separate submission under that order.

When an agency makes a change to an information technology installation, telecommunication network, or any other general changes in information collection, processing, dissemination, or storage that affect multiple systems of records, it may submit a single consolidated new or altered system report, with changes to existing notices and supporting documentation included in the submission.

(2) *Contents of the Report.* The report for a new or altered system has three elements: a transmittal letter, a narrative statement, and supporting documentation that includes a copy of the proposed Federal Register notice. There is no prescribed format for either the letter or the narrative statement. The notice must appear in the format prescribed by the Office of the Federal Register's *Document Drafting Handbook.*

(a) *Transmittal Letter.* The transmittal letter shoud be signed by the senior agency official responsible for implementation of the Act within the agency and should contain the name and telephone number of the individual who can best answer questions about the system. The letter should contain the agency's assurance that the proposed system does not duplicate any existing agency systems. It should also state that a copy of the report has been distributed to the Speaker of the House and the President of the Senate as the Act requires. The letter may also include requests for waiver of the reporting time period.

(b) *Narrative Statement.* The narrative statement should be brief. It should make reference, as appropriate, to information in the supporting documentation rather than restating such information. The statement should:

(*1*) Describe the purpose for which the agency is establishing the system of records.

(*2*) Identify the authority under which the system is maintained. The agency should avoid citing housekeeping statutes, but rather cite the underlying programmatic authority for collecting, maintaining, and using the information. When the system is being operated to support an agency housekeeping program, e.g., a carpool locator, the agency may, however, cite a general housekeeping statute that authorizes the agency head to keep such records as are necessary.

(*3*) Provide the agency's evaluation of the probable or potential effects of the proposal on the privacy of individuals.

(*4*) Describe the relationship of the proposal, if any, to the other branches of the Federal Government and to State and local governments.

(*5*) Provide a brief description of the steps taken by the agency to minimize the risk of unauthorized access to the system of records. A more detailed assessment of the risks and specific administrative, technical, procedural, and physical safeguards established shall be made available to OMB upon request.

(*6*) Explain how each proposed routine use satisfies the compatibility requirement of subsection (a)(7) of the Act. For altered systems, this requirement pertains only to any newly proposed routine uses.

(*7*) Provide OMB control numbers, expiration dates, and titles of any OMB approved information collection requirements contained in the system of records. If the request for OMB clearance of an information collection is pending, the agency may simply state the title of the collection and the date it was submitted for OMB clearance.

(c) *Supporting Documentation.* Attach the following to all new or altered system reports:

(*1*) An advance copy of the new or altered system notice (consistent with the provisions of 5 U.S.C. 552a(e)(4)) that the agency proposes to publish for the new or altered system. For proposed altered systems the documentation should be in the same form as the agency proposes to publish in the public notice.

(*2*) An advance copy of any new rules or changes to published rules (consistent with the provision of 5 U.S.C. 552a (f), (j), and (k)) that the agency proposes to issue for the new or altered system. If no changes to existing rules are required, the agency shall so state in the narrative portion of the report. Proposed changes to existing rules shall be provided in the same form as the agency proposes to publish for formal notice and comment.

(3) *Timing and Distribution for Submitting New and Altered System Reports.* Submit reports on new and altered systems of records not later than 60 days prior to establishment of a new system or the implementation of an altered system (5 U.S.C. 552a(o)). Submit three copies of each report to:

President of the Senate, Washington, D.C. 20510

Speaker of the House of Representatives, Washington, D.C. 20515

Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, D.C. 20503.

Agencies may assume that OMB concurs in Privacy Act aspects of their proposal if OMB has not commented within 60 days from the date the transmittal letter was signed. Agencies may publish system and routine use notices as well as exemption rules in the Federal Register at the same time that they send the new or altered system report to OMB and the Congress. The 60-day period for OMB and Congressional review and the 30-day notice and comment period for routine uses and exemptions will then run concurrently.

(4) *Waivers of Report Time Period.* The Director, OMB, may grant a waiver of the 60-day period if the agency asks for the waiver and can demonstrate compelling reasons. Agencies may assume that OMB concurs in their request if OMB has not commented within 30 days of the date the transmittal letter was signed. When a waiver is granted, the agency is not thereby relieved of any other responsibility or liability under the Act. Note that OMB cannot waive time periods specifically established by the Act. Agencies will still have to meet the statutory notice and comment periods required for establishing a routine use or claiming an exemption.

Appendix II to OMB Circular No. A-130—Cost Accounting, Cost Recovery, and Interagency Sharing of Information Technology Facilities

1. *Purpose.*

This Appendix establishes procedures for cost accounting, cost recovery, and interagency sharing of Federal information technology facilities. The Appendix revises procedures formerly contained in OMB Circular No. A-121, now rescinded.

2. *Applicability.*

This Appendix applies to all information technology facilities that are operated by or on behalf of a Federal agency; provide information technology service to more than one user; operate one or more general management computers; and have obligations in excess of $3 million per year.

3. *Definitions.*

a. The term "information technology facility" means an organizationally defined set of personnel, hardware, software, and physical facilities, a primary function of which is the operation of information technology. An information technology facility includes:

(1) The personnel who operate computers or telecommunications systems; develop or maintain software; provide user liaison and training; schedule computers, prepare and control input data; control, reproduce, and distribute output data; maintain tape and disk libraries; provide security, maintenance, and custodial services; and directly manage or provide direct administrative support to personnel engaged in these activities.

(2) The owned or leased computer and telecommunications hardware, including central processing units; associated peripheral equipment such as disk drives, tape drives, drum storage, printers, card readers, and consoles; data entry equipment; data reproduction, decollation, booking, and binding equipment; telecommunications equipment including control units, terminals, modems, and dedicated telephone and satellite links provided by the facility to enable data transfer and access to users. Hardware acquired and maintained by users of the facility is excluded.

(3) The software, including operating system software, utilities, sorts, language processors, access methods, data base processors, and other similar multi-user software required by the facility for support of the facility and/or for general use by users of the facility. All software acquired or maintained by users of the facility is excluded.

(4) The physical facilities, including computer rooms; tape and disk libraries; stockrooms and warehouse space; office space; physical fixtures.

b. The term "full costs" means all significant expenses incurred in the operation of an information technology facility. The following elements are included:

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(1) Personnel, including salaries, overtime, and fringe benefits of civilian and military personnel: training: and travel.

(2) Equipment, including depreciation for owned, capitalized equipment: equipment rental or lease: and direct expenses for noncapitalized equipment.

(3) Software, including depreciation for capitalized costs of developing, converting, or acquiring software: rental of for software: and direct expenses for noncapitalized acquisition of software.

(4) Supplies, including office supplies: data processing materials: and miscellaneous expenses.

(5) Contracted services, including technical and consulting services: equipment maintenance: data entry support: operations support: facilities management: maintenance of software: and telecommunications network services.

(6) Space occupancy, including rental and lease of buildings, general office furniture, and equipment: building maintenance: heating, air conditioning and other utilities: telephone services: power conditioning and distribution equipment and alternate power sources: and building security and custodial services.

(7) Intra-agency services, including normal agency support services that are paid by the installation.

(8) Interagency services, including services provided by other agencies and departments that are paid by the installation.

c. The term "user" means an organizational or programmatic entity that receives service from an information technology facility. A user may be either internal or external to the agency organization responsible for the facility, but normally does not report either to the manager or director of the facility or to the same immediate supervisor.

d. The term "general management computer" means a digital computer that is used for any purpose other than as a part of a process control system, space system, mobile system, or a system meeting one of the exclusions identified in the Department of Defense Authorization Act of 1982.

4. *Accounting and Reimbursement for Sharing of Information Technology Facilities.*

a. *Interagency Sharing.* Agencies shall:

(1) Share their information technology facilities with users from other agencies to the maximum extent feasible:

(2) Document sharing arrangements, where the total annual reimbursement exceeds $500,000, with individual written agreements that identify:

(a) Services available for sharing:

(b) Service priority procedures and terms (e.g., quality performance standards) to be provided to each user:

(c) Prices to be charged for providing services:

(d) Reimbursement arrangements for services provided: and

(e) Arrangements for terminating the sharing agreement:

(3) Provide standard terms and conditions to users obtaining similar services insofar as possible:

(4) Include such sharing arrangements, when fully documented and part of a formal sharing program, in justifications to OMB for resource requests (see OMB Circular No. A–11, revised) and allocations. Direct funding by a shared facility should be requested only where exceptional circumstances preclude the user agency from using alternative sources.

b. *Cost Accounting.* Agencies shall account for the full cost of the operation of information technology facilities.

c. *User Cost Distribution System.* Agencies shall implement a system to distribute the full cost of providing services to all users. That system will:

(1) Be consistent with guidance provided in the Federal Information Processing Standards Publication No. 96. "Guidelines for Developing and Implementing a Charging System for Data Processing Services" (National Bureau of Standards. Department of Commerce. 1982).

(2) Price each service provided by the facility to the users of that service on an equitable basis commensurate with the amount of resources required to provide that service and the priority of service provided. The price of individual transactions may be estimated provided that they are periodically reconciled to assure that the full costs of operations are equitably distributed among all users.

(3) Directly distribute to the recipient of the services the full costs of dedicated services. including applications developed and maintained: software unique to a single application: and telecommunications equipment. including control units. terminals. modems. and dedicated telephone or satellite links provided by the facility to enable data transfer and computer access to users.

d. *Cost Recovery.* Consistent with statutory authority. agencies shall:

(1) Submit periodic statements to all users of agency information technology facilities specifying the costs of services provided:

(2) Recover full costs from Federal users of the facility: and

(3) Recover costs from nonfederal users of the facilities consistent with OMB Circular No. A–25.

e. *Accounting for Reimbursements Received.* Agencies shall:

(1) Include resource requests for the amount of planned information technology use in user budget and appropriation requests:

(2) Assure that shared facilities reduce budget and appropriation requests by the amount of planned reimbursements from users:

(3) Prepare. at the close of each fiscal year. a report that documents in the agency's official records the full past year cost of operating information technology facilities that recover more than $500.000 per year from sharing reimbursements: and

(4) Use the portion of reimbursements arising from equipment and software depreciation for the replacement of equipment and software capital assets. provided such usage is included in the agency's budget.

5. *Selection of Information Technology Facilities To Support New Applications.*

In selecting information technology facilities to support new applications. agencies shall establish a management control procedure for determining which facility will be used to support each significant application. This procedure shall ensure that:

(a) All alternative facilities are considered. including other Federal agency and nonfederal facilities and services:

(b) Agency rules do not require that priority be given to the use of in-house facilities: and

(c) The user of the application has primary responsibility for selecting the facility.

6. *Assignment of Responsibilities.*

a. *All Federal Agencies.* The head of each agency shall:

(1) Establish policies and procedures and assign responsibilities to implement the requirements of this Appendix: and

(2) Ensure that contracts awarded for the operation of information technology facilities include provisions for compliance with the requirements of this Appendix.

b. *General Services Administration.* The Administrator of General Services shall:

(1) Ensure that information technology facilities designated as Federal Data Processing Centers comply with the procedures established by this Appendix:

(2) Ensure that provisions consistent with this Appendix are included in contracts for the operation of information technology facilities when acquiring services on behalf of an agency:

7. *Implementation Requirements.*

Agencies shall implement the provisions of this Appendix effective at the beginning of fiscal year 1987.

Appendix III to OMB Circular No. A-130—Security of Federal Automated Information Systems

1. *Purpose.*

This Appendix establishes a minimum set of controls to be included in Federal automated information systems security programs; assigns responsibilities for the security of agency automated information systems; and clarifies the relationship between such agency security programs and internal control systems established in accordance with OMB Circular No. A-123, Internal Control Systems. The Appendix revises procedures formerly contained in Transmittal Memorandum No. 1 to OMB Circular No. A-71, now rescinded, and incorporates responsibilities from applicable national security directives.

2. *Definitions.*

a. The term "automated information system" means an information system (defined in Section 6d of the Circular) that is automated.

b. The term "information technology installation" means one or more computer or office automation systems including related telecommunications, peripheral and storage units, central processing units, and operating and support system software. Information technology installations may range from information technology facilities such as large centralized computer centers to individual stand-alone microprocessors such as personal computers.

c. The term "sensitive data" means data that require protection due to the risk and magnitude of loss or harm that could result from inadvertent or deliberate disclosure, alteration, or destruction of the data. The term includes data whose improper use or disclosure could adversely affect the ability of an agency to accomplish its mission, proprietary data, records about individuals requiring protection under the Privacy Act, and data not releasable under the Freedom of Information Act.

d. The term "sensitive application" means an application of information technology that requires protection because it processes sensitive data, or because of the risk and magnitude of loss or harm that could result from improper operation or deliberate manipulation of the application.

e. The term "security specifications" means a detailed description of the safeguards required to protect a sensitive application.

3. *Automated Information Systems Security Programs.*

Agencies shall assure an adequate level of security for all agency automated information systems, whether maintained in-house or commercially. Specifically, agencies shall:

—Assure that automated information systems operate effectively and accurately;

—Assure that there are appropriate technical, personnel, administrative, environmental, and telecommunications safeguards in automated information systems; and

—Assure the continuity of operation of automated information systems that support critical agency functions.

Agencies shall implement and maintain an automated information systems security program, including the preparation of policies, standards, and procedures. This program will be consistent with government-wide policies, procedures, and standards issued by the Office of Management and Budget, the Department of Commerce, the Department of Defense, the General vices Administration, and the Office ersonnel Management. Agency grams shall incorporate additional requirements for securing national security information in accordance with appropriate national security directives. Agency programs shall, at a minimum, include four primary elements: applications security, personnel security, information technology installation security, and security awareness and training.

a. *Applications Security.*

(1) *Management Control Process and Sensitivity Evaluation.* Agencies shall establish a management control process to assure that appropriate administrative, physical, and technical safeguards are incorporated into all new applications, and into significant modifications to existing applications. Management officials who are the primary users of applications should evaluate the sensitivity of new or existing applications being substantially modified. For those applications considered sensitive, the management control process shall, at a minimum, include security specifications and design reviews and systems tests.

(a) *Security Specifications.* Agencies shall define and approve security uirements and specifications prior to uiring or starting formal velopment of the applications. The results of risk analyses performed at the information technology installation where the applications will be processed should be taken into account when defining and approving security specifications for the applications. Other vulnerabilities of the applications, such as in telecommunications links, shall also be considered in defining security requirements. The views and recommendations of the information technology user organization, the information technology installation, and the individual responsible for security at the installation shall be considered prior to the approval of security specifications for the applications.

(b) *Design Reviews and System Tests.* Agencies shall conduct and approve design reviews and system tests, prior to placing the application into operation, to assure the proposed design meets the approved security specifications. The objective of the system tests should be to verify that required administrative, technical, and physical safeguards are operationally adequate. The results of the design reviews and systems tests shall be fully documented and intained in the official agency ords.

(c) *Certification.* Upon completion of the system tests, an agency official shall certify that the system meets all applicable Federal policies, regulations, and standards, and that the results of the tests demonstrate that the installed security safeguards are adequate for the application.

(2) *Periodic Review and Recertification.* Agencies shall conduct periodic audits or reviews of sensitive applications and recertify the adequacy of security safeguards. Audits or reviews shall evaluate the adequacy of implemented safeguards, assure they are functioning properly, identify vulnerabilities that could heighten threats to sensitive data or valuable resources, and assist with the implementation of new safeguards where required. They are intended to provide a basis for recertification of the security of the application. Recertification shall be fully documented and maintained in the official agency records. Audits or reviews and recertifications shall be performed at least every three years. They should be considered as part of agency vulnerability assessments and internal control reviews conducted in accordance with OMB Circular No. A–123. Security or other control weaknesses identified shall be included in the annual internal control assurance letter and report required by Circular No. A–123.

(3) *Contingency Plans.* Agencies shall establish policies and assign responsibilities to assure that appropriate contingency plans are developed and maintained by end users of information technology applications. The intent of such plans is to assure that users can continue to perform essential functions in the event their information technology support is interrupted. Such plans should be consistent with disaster recovery and continuity of operations plans maintained by the installation at which the application is processed.

b. *Personnel Security.* Agencies shall establish and manage personnel security policies and procedures to assure an adequate level of security for Federal automated information systems. Such policies and procedures shall include requirements for screening all individuals participating in the design, development, operation, or maintenance of sensitive applications as well as those having access to sensitive data. The level of screening required by these policies should vary from minimal checks to full background investigations, depending upon the sensitivity of the information to be handled and the risk and magnitude of loss or harm that could be caused by the individual. These policies shall be established for both Federal and contractor personnel. Personnel security policies for Federal employees shall be consistent with policies issued by the Office of Personnel Management.

c. *Information Technology Installation Security.* Agencies shall assure that an appropriate level of security is maintained at all information technology installations operated by or on behalf of the Federal Government (e.g., government-owned, contractor-operated installations).

(1) *Assigning Responsibility.* Agencies shall assign responsibility for the security of each installation to a management official knowledgeable in information technology and security matters.

(2) *Periodic Risk Analysis.* Agencies shall establish and maintain a program for the conduct of periodic risk analyses at each installation to ensure that appropriate, cost effective safeguards are incorporated into existing and new installations. The objective of a risk analysis is to provide a measure of the relative vulnerabilities and threats to an installation so that security resources can be effectively distributed to minimize potential loss. Risk analyses may vary from an informal review of a microcomputer installation to a formal, fully quantified risk analysis of a large scale computer system. The results of these analyses should be documented and taken into consideration by management officials when certifying sensitive applications processed at the installation. Such analyses should also be consulted during the evaluation of general controls over the management of information technology installations conducted in accordance with OMB Circular No. A–123. A risk analysis shall be performed:

(a) Prior to the approval of design specifications for new installations;

(b) Whenever a significant change occurs to the installations (e.g., adding a local area network; changing from batch to online processing; adding dial-up capability). Agency criteria for defining significant change shall be commensurate with the sensitivity of the data processed by the installation.

(c) At periodic intervals established by the agency commensurate with the sensitivity of the data processed, but not to exceed every five years if no risk analysis has been performed during that period.

(3) *Disaster and Continuity Plan.* Agencies shall maintain disaster recovery and continuity of operations plans for all information technology installations. The objective of these plans should be to provide reasonable continuity of data processing support

should events occur that prevent normal operations at the installation. For large installations and installations that support essential agency functions, the plans should be fully documented and operationally tested periodically, at a frequency commensurate with the risk and magnitude of loss or harm that could result from disruption of information technology support.

(4) *Acquistion Specifications.* Agencies shall assure that appropriate technical, administrative, physical, and personnel security requirements are included in specifications for the acquisition or operation of information technology installations, equipment, software, and related services, whether procured by the agency or by GSA. These security requirements shall be reviewed and approved by the management official responsible for security at the installation making the acquisition.

d. *Security Awareness and Training Programs.* Agencies shall establish a security awareness and training program to assure that agency and contractor personnel involved in the management, operation, programming, maintenance, or use of information technology are aware of their security responsibilities and know how to fulfill them. Users of information technology systems should be apprised of the vulnerabilities of such systems and trained in techniques to enhance security.

4. *Assignment of Responsibilities.*

a. *Department of Commerce.* The Secretary of Commerce shall:

(1) Develop and issue standards and guidelines for assuring the security of Federal automated information systems;

(2) Establish standards, approved in accordance with applicable national security directives, for systems used to process sensitive information the loss of which could adversely affect the national security interest; and

(3) Provide technical assistance to Federal agencies in implementing Department of Commerce standards and guidelines.

b. *Department of Defense.* The Secretary of Defense shall:

(1) Act, in accordance with applicable national security directives, as executive agent of the government for the security of telecommunications and automated information systems that process information the loss of which could adversely affect the national security interest; and

(2) Provide technical material and assistance to Federal agencies concerning security of Federal telecommunications and automated information systems.

c. *General Services Administration.* The Administrator of General Services shall:

(1) Issue policies and regulations for the physical and environmental security of computer rooms in Federal buildings consistent with standards issued by the Department of Commerce and the Department of Defense.

(2) Assure, that agency procurement requests for computers, software, telecommunications services, and related services include security requirements. Delegations of procurement authority to agencies by GSA under mandatory programs, dollar threshold delegations, certification programs, or other so-called blanket delegations shall include requirements for agency specification of security requirements.

(3) Assure that information technology equipment, software, computer room construction, guard or custodial services, telecommunications services, and any other related services procured by GSA meet the security requirements, established and specified by the user agency and are consistent with other applicable policies and standards issued by OMB, the Department of Commerce, the Department of Defense, and the Office of Personnel Management.

(4) Issue appropriate standards for the security of Federal telecommunications systems. Standards related to systems used to communicate sensitive information. the loss of which could adversely affect the national security interest. shall be developed and issued in accordance with applicable national security directives.

d. *Office of Personnel Management.* The Director. Office of Personnel Management. shall maintain personnel security policies for Federal personnel associated with the design. programming. operation. maintenance. or use of Federal automated information systems. Requirements for personnel checks imposed by these policies should vary commensurate with the risk and magnitude of loss or harm that could be caused by the individual. The checks may range from merely normal reemployment screening procedures to full background investigations.

5. *Reports.* In their annual internal control report to the President and the Congress. required under OMB Circular No. A-123. agencies shall:

a. Describe any security or other control weaknesses identifed during audits or reviews of sensitive applications or when conducting risk analyses of installations: and

b. Provide assurance that there is adequate security of agency automated information systems.

Appendix IV to OMB Circular No. A-130—Analysis of Key Sections

1. Purpose

The purpose of this Appendix is to provide a general context and explanation for the contents of the key sections of the Circular.

2. Background

The Paperwork Reduction Act of 1980 Pub. L. 96-511. 94 Stat 2812. codified at Chapter 35 of Title 44 of the United States Code. establishes a broad mandate for agencies to perform their information activities in an efficient. effective. and economical manner. Section 3504 of the Act provides authority to the Director. Office of Management and Budget (OMB). to develop and implement uniform and consistent information resources management policies: oversee the development and promote the use of information management principles. standards. and guidelines: evaluate agency information management practices in order to determine their adequacy and efficiency: and determin compliance of such practices with the policies. principles. standards. and guidelines promulgated by the Director

The Circular implements OMB authority under the Act with respect to Section 3504(b). general information policy. Section 3504(e). records management. Section 3504(f). privacy. and Section 3504(g). Federal automatic data processing and telecommunications: the Privacy Act o 1974 (5 U.S.C. 552a): Sections 111 and 206 of the Federal Property and Administrative Services Act of 1949. as amended (40 U.S.C. 759 and 487. respectively): the Budget and Accounting Act of 1921 (31 U.S.C. 1 et seq.): and Executive Order No. 12046 of March 27. 1978 and Executive Order N 12472 of April 3. 1984. Assignment of National Security and Emergency Telecommunications Functions. The Circular complements 5 CFR Part 1320. Controlling Paperwork Burden on the Public. which implements other section of the Paperwork Reduction Act dealin with controlling the reporting and recordkeeping burden placed on the public.

In addition. the Circular revises and consolidates policy and procedures in five existing OMB directives and rescinds those directives. as follows:

A-71—Responsibilities for the Administration and Management of Automatic Data Processing Activitie

Transmittal Memorandum No. 1 to Circular No. A-71—Security of

Federal Automated Information
ystems
90—Cooperating with State and Local
Governments to Coordinate and
Improve Information Systems
A-108—Responsibilities for the
Maintenance of Records about
Individuals by Federal Agencies
A-121—Cost Accounting, Cost
Recovery, and Interagency Sharing of
Data Processing Facilities.

OMB's review of the five existing policy directives led to the conclusion that much, but not all, of their content was procedural in nature, concerned chiefly with how policies were to be carried out. OMB determined that it was important clearly to distinguish the statement of policies from the procedures for implementing those policies. For this reason, the main body of the Circular consists of basic considerations and assumptions, policies, and assignments of responsibility; the appendices to the Circular consist of procedures for implementing various policies and with analysis of key sections.

OMB developed the main body of the Circular relying upon comments on the Federal Register notice as well as other forms of Federal agency and public put, principally meetings with terested parties. For the procedural revisions, OMB relied on the assistance of interagency task groups.

The revised contents of OMB Circular No. A-71, dealing with assignments of responsibilities, are in the main body of this Circular. The contents of OMB Circular No. A-90 are rescinded entirely, with the exception of a policy statement at Section 8(b)(17) of this Circular. Revisions of the procedural aspects of the other three policy directives—Transmittal Memorandum No. 1 to A-71, A-108, and A-121—are appendices to this Circular. Appendices I, II, and III have the same prescriptive force as the Circular; Appendix IV is an explanatory document.

On September 17, 1984, the President signed National Security Decision Directive (NSDD) No. 145, National Policy on Telecommunications and Automated Information Systems Security. The NSDD requires that the Director, OMB, review for consistency with the NSDD, and amend as appropriate, OMB Circular No. A-71, Transmittal Memorandum No. 1. The Circular and Appendix III satisfy the NSDD requirement.

1. Analysis

Section 6. Definitions.

f. Access to information. g. Dissemination of information. The Circular defines "access to information" as the function of providing to members of the public, upon their request, the government information to which they are entitled under law. Access refers to those situations in which the government agency's role is passive: access is what the government's responsibilities are when the public comes to the government and asks for information the government has and the public is entitled to. "Dissemination," in the Circular's usage, refers to the function of distributing government information; dissemination connotes an active outreach by a government agency. Dissemination refers to those situations in which the government provides the public with information without the public having to come and ask for it.

The distinction between access and dissemination is posed in order to elaborate the responsibilities of Federal agencies for providing information to the public. Two fundamentally different situations exist: one in which the public goes to the agency to ask for information the agency holds and may or may not have disseminated; and one in which the agency chooses to take the information it holds to the public. In the first instance—access—Congress has provided specific statutory policy in the

Freedom of Information Act (FOIA) and in the Privacy Act. These laws and policies concerning access to government information are explicit, well known, and now so widely accepted in practice by Federal agencies as not to require policy elaboration in this Circular. Agencies should know that, if members of the public ask for information subject to FOIA or the Privacy Act, the agencies should normally provide the information forthwith, because the public has a formal legal process for forcing the agencies to yield the information.

The relationship between access to and dissemination of information is explained below, in the discussion of 8a(8) through (12).

Section 7. Basic Considerations and Assumptions

Basic considerations and assumptions are statements that provide the underpinnings for the prescriptive policies in Section 8; they are not themselves policy statements. They are either derived from statutes or legislative history, or represent executive branch management philosophy as embodied in the Circular.

—Statements 7–a through 7–d provide the general context for management of Federal information resources.

—Statement 7–e summarizes policy found in OMB Circular No. A–76, Performance of Commercial Activities.

—Statement 7–f states a general predisposition to use up-to-date information technology to manage Federal information resources.

—Statements 7-g and 7-h pertain to the Privacy Act and the Freedom of Information Act, respectively.

—Statement 7-i pertains to the National Science and Technology Policy, Organization and Priorities Act.

—Statement 7-j pertains to the Federal Records Act.

—Statement 7-k states a relationship between Federal information policy and international information policy.

Section 8. Policies

This section is divided into two subsections that generally correspond to the twofold definition of information resources management in Section 6-b, namely, information itself and the resources associated with information.

a. Information Management. The Paperwork Reduction Act acknowledges that information is a valuable resource and should be managed as such. Proceeding from this premise, this subsection states policies concerning the management of Federal information.

(1) and (2). Information Collection and Sharing. The Circular's basic considerations and assumptions (Section 7) establish the value of government information activities. Without question, some information created or collected by Federal agencies is so vital that the American form of government, the economy, national security, and citizens' safety and wellbeing could not continue to exist in its absence. Nothing in this Circular is intended to diminish or derogate the creation or collection of such information, nor to serve as a pretext under which a Federal agency could damage the Nation's critical needs by failing to create or collect such information.

At the same time, the Paperwork Reduction Act was designed to remedy deficiencies Congress perceived in Federal information activities. In the words of the report of the House Committee on Government Operations (Report No. 96–835, p. 3):

> The legislation is the result of a growing concern that the way the Government collects, uses, and disseminates information must be improved. Inefficiencies in current Federal information practices drastically reduce the effectiveness of the Government while, at the same time, drowning our

citizens in a sea of forms, questionnaires, and reports.

The Act intends that the creation or collection of information be carried out within the context of efficient, effective, and economical management. When Federal agencies create or collect information—just as when they perform any other vital functions—they consume scarce resources and such activities must be continually scrutinized in light of good management principles. The applicable principles provided in the purposes of the Act are:

—To minimize the Federal paperwork burden for individuals, small businesses, State and local governments, and other persons;
—To minimize the cost to the Federal Government of collecting, maintaining, using and disseminating information; and
—To maximize the usefulness of information collected by the Federal Government. (44 U.S.C. 3501)

Agencies must justify the creation or collection of information in the light of their statutory functions. Policy statement 8a(9) uses the standard, "necessary for the proper performance of agency functions," taken directly from the Paperwork Reduction Act (44 U.S.C. 3504(c)(2)). Further, the policy statement includes the requirement that the information have practical utility, as defined in the Paperwork Reduction Act (44 U.S.C. 3502(15)) and elaborated in Controlling Paperwork Burdens on the Public (5 CFR Part 1320). Note that practical utility includes characteristics pertaining to the quality of information such as accuracy, adequacy, and reliability, and that, in the case of general purpose statistics or recordkeeping, practical utility means that actual uses can be demonstrated (5 CFR 1320.7 (q)).

Good management and the requirement of practical utility dictate that agencies must plan from the outset for the steps in the information life cycle. The Act also stipulates that agencies must "formulate plans for tabulating the information in a manner which will enhance its usefulness to other agencies and to the public" (44 U.S.C. 3507(a)(1)(C)). When creating or collecting information, agencies must plan how they will process and transmit the information, how they will use it, what provisions they will make for access to it, whether and how they will disseminate it, how they will store it, and finally, how the information will ultimately be disposed of. While agencies cannot at the outset achieve absolute certitude in planning for each of these processes, the requirement for information resources planning is clearly contained in the Act (44 U.S.C. 3506(c)(1)), and the absence of adequate planning is sufficient reason not to create or collect information in the first place.

Before creating or collecting new information, agencies should look first to other agencies and the private sector so as not to duplicate existing information sources or services that would satisfy their needs. The Act requires that agencies shall not conduct or sponsor information collections unless they have eliminated collections "which seek to obtain information available from another source within the Federal Government" (44 U.S.C. 3507(a)(1)(A)). Each agency must also "ensure its information systems do not overlap each other or duplicate the systems of other agencies" (44 U.S.C. 3506(c)(2)). The Act also contains provisions governing the sharing of information between agencies (44 U.S.C. 3510). Applying the policy of OMB Circular No. A–76, the Circular also requires agencies to examine the possibility of acquiring the necessary information from private sector sources.

This is not to say that information creation or collection functions should be indiscriminately turned over to other agencies or to the private sector, but rather to say that agencies have an obligation to examine other potential sources of information which may satisfy agency needs. Some information can only be created or collected by Federal agencies themselves in the exercise of the government's sovereign powers. For some information, the government can satisfy its legitimate needs only when a Federal agency is the creation or collection agent. But other information needs can be met, and in many cases are routinely met, through existing services and sources in other agencies or the private sector. In many cases there is no inherently governmental function that is served by having information collected by a Federal agency; agencies should and do consider acquiring information collection services from the private sector. The Circular emphasizes that these sources should always be looked to first in the interests of efficiency and economy.

(3) through (6). Privacy Act and Freedom of Information Act. These statements contain policy statements pertaining to the Privacy Act and incorporating the policies of OMB Circular No. A-108, which is rescinded and superseded. Agencies are to ensure that they meet the requirements of the Privacy Act regarding collection of individually identifiable information. Such information is to be maintained and protected so as to preclude intrusion into the privacy of individuals. Individuals must be accorded access and amendment rights to records, as provided in the Privacy Act. Appendix I prescribes procedures for the maintenance of records about individuals in accordance with the Privacy Act.

In addition to Privacy Act considerations, statements (3) and (4) include provisions concerning proprietary information. Agencies are to minimize their collection of proprietary information, consistent with legal requirements and operational necessity and, when such information must be collected, agencies must provide for its protection.

(7). Training. Agency personnel must receive proper training to safeguard information resources. Training is particularly important in view of the changing nature of information resources management. The development of end user computing and office automation, for example, place the management of information and information technology in the hands of nearly all agency personnel rather than in the hands of a few employees at centralized facilities such as large computer centers. Policies and procedures for computer security, records management, protection of privacy, and other safeguards need to be incorporated into information resources management training programs.

(8) through (12). Information Dissemination.

(8) and (9). General Policy. How does the public know what information is available from Federal agencies? That is, given the distinction the Circular makes between access and dissemination, what is the relationship between the two? How does the public know what government information is accessible? The answer is: through the government's dissemination of information on what is available and how to gain to access it.

The Freedom of Information Act requires each agency to publish currently in the Federal Register, for the guidance of the public, descriptions of agency organization; where and how the public may obtain information; the general course and methods by which agency functions are determined, including all procedural requirements; rules of procedure; descriptions of forms and how to obtain them; substantive regulations; statements of general policy; and revisions to all the foregoing (5 U.S.C. 552(a)(1)). The Privacy Act also requires publication of information concerning systems of records (see pendix I): the Government in the ashine Act requires agencies to make ublic announcement of meetings (5 U.S.C. 552b(e)(1)). The Paperwork Reduction Act (44 U.S.C. 3507(a)(2)) and Controlling Paperwork Burdens on the Public (5 CFR Part 1320) require agencies to publish notices when they submit information collection requests for OMB approval.

In sum, every Federal agency has obligations to disseminate basic information to the public concerning what the agency does, how its programs operate, what the public must do to comply with laws or regulations, how to receive benefits, and how the public can use agency services. These obligations are the basic linkage between access to, and dissemination of, government information.

Beyond generic requirements, specific laws affect agency dissemination of information in two ways. First, for some agencies their basic enabling legislation stipulates that information dissemination is part of their statutory mission. General purpose statistical agencies, for example, have information dissemination as part of their very reason for existence. These agencies nduct substantial information issemination programs in order to arry out their necessary functions. In contrast, other agencies such as some regulatory agencies have basic information access, but minimal information dissemination responsibilities: the existence of substantial information dissemination programs in such agencies would be unusual. Second, statutes may sometimes require that agencies produce and disseminate specific information products or services. For example, the law may state that the President or head of an agency shall make reports to the Congress on given subjects: these would be legally required disseminations of information.

Beyond generic and specific statutory requirements, agencies have positive obligations to disseminate information as a necessary part of performing their functions. Each agency head must clarify the nature of these obligations for the agency's particular mission and set appropriate boundaries for dissemination functions. Before deciding to disseminate an information product or service, and periodically thereafter, an agency must be able to demonstrate that the dissemination of the product or rvice passes the test of either being quired by law or being necessary for the proper performance of agency functions.

In conformity with the purposes of the Paperwork Reduction Act, the agency's positive obligations to disseminate information must be discharged within a responsible management framework of minimizing costs to the Federal Government while maximizing the usefulness of the information. Efficient, effective, and economical dissemination does not translate into diminishing or limiting the flow of information from the agency to the public. To the contrary, good management of information resources should result in more useful information flowing with greater facility to the public, at less cost to the taxpayer.

Given an adequate basis for dissemination, agencies must also ask themselves whether a proposed or existing information product or service substantially duplicates similar products or services that would otherwise be available, either from another agency or from the private sector. This requirement of non-duplication, originating in the Paperwork Reduction Act, husbands scarce resources and leads to more efficient, effective, and economical information dissemination by the government.

Similarly, the fact that an agency has created or collected information is not itself a valid reason for creating a program, product, or service to disseminate the information to the public. Agencies create and collect much information, often for purely internal governmental purposes, that is not intended for dissemination, for which there is no public demand, and the dissemination of which would serve no public purpose and would not be cost-justified; e.g., compilations of routine time and attendance records for Federal employees, or publication of the thousands of pages of common carrier tariff filings by regulatory agencies. While such information may be subject to access upon request under provisions of agency statutes, the Freedom of Information Act, or the Privacy Act, the agency must demonstrate in each case the need actively to disseminate such information. Over time, changes in laws, economic conditions, or information technology can result in changes in public demand, public purpose, or dissemination costs; for example, an agency's shift to electronic filing of reports, perhaps carried out primarily in order to improve internal information management, might generate a public demand for electronic dissemination that could be satisfied at minimal cost to the government and also improve the performance of the agency's information access function. The decision to disseminate information, however, entails potentially significant costs, must be addressed separately from the decision to create or collect information, and must hinge upon a determination that dissemination is necessary for proper performance of agency functions.

If agencies do contemplate disseminating particular information, they should plan for its dissemination when creating or collecting the information (see 8a(1)). Planning for dissemination should proceed from the Paperwork Reduction Act premises of minimizing the cost to the government while maximizing the usefulness of information. The focus of information dissemination plans should be on elevating to a policy level decisions regarding the agency's positive obligations to disseminate information and ensuring that the agency discharges the obligations in the most efficient, effective, and economical manner.

(10) Adequate Notice. Because many government information activities are important to the government and to the public, agencies must exercise care not to act capriciously with respect to information products and services. When agencies intend to commence offering new products or services, they should provide adequate advance notice so that the public may comment as to the need for the product or service. For example, if private sector interests believe they are already offering or are about to offer the same or a similar product or service—in which event the government may potentially be entering into unfair competition—such notice will allow these interests to present their case before the product or service is launched. By the same token, if many members of the public greatly depend on a particular product or service, they should be permitted to voice their views to an agency that is contemplating termination of the product or service.

The Circular refers to "significant" information products and services. It is not the Circular's intent that agencies should follow notice and comment procedures when terminating relatively inconsequential information products and services; examples might be minor brochures or flyers, products and services that were never intended to be continuing, or for which there is now little or no public audience. Agencies should determine for themselves whether information products and services are "significant," and in some cases may wish to establish procedures and threshold criteria for making such determinations. If a product or service is considered significant, as determined ultimately by the agency head, the agency may be well advised to follow notice and comment procedures prior to initiation or termination.

(11)(a). Reaching the Public: Avoiding Information Monopolies. When agencies have justified and made the basic decision to disseminate information, they must also satisfy conditions regarding the manner of dissemination. First, agencies must take steps to ensure that members of the public whom the agency has an obligation to reach have a reasonable ability to acquire the information. The audiences for information products and services will vary, and agencies should tailor the dissemination methods so as to place the information into the hands of those whom the agency intends to receive it.

Federal agencies are often the sole holders of certain information: hence, when they disseminate, they are sole suppliers and in a position of natural monopoly. When agencies use private sector contractors to accomplish dissemination, they must take care that they do not permit contractors to exercise monopolistic controls in ways that defeat the agencies' information dissemination obligations, for example, by setting unreasonably high prices. In some cases agencies may need to formulate contractual terms with a sole supplier contractor so that the contractor functions as a mere intermediary for the agency in dealing with end users in the public.

(11)(b). Reliance on the Private Sector. In disseminating information—as with other activities—agencies must act in the most cost effective manner, which includes maximum feasible reliance on the private sector. This is merely an application to agency information dissemination programs of the policy stated in OMB Circular No. A-76, Performance of Commercial Activities, and summarized in Section 7f of this Circular. It is "the general policy of the government to rely on commercial sources to supply the products and services the government needs," including products and services the government needs in order to disseminate information to the public. For example, before an agency establishes a service for electronic dissemination of government information via an online computer system, the agency should compare the cost of contracting for operation of the service versus in-house performance and determine whether in-house performance is less costly both for the government and for the public who will receive the service.

Policies contained in OMB Circular No. A-76 are applicable to information dissemination, including the policy that inherently governmental functions should be performed by government employees. The general policy of reliance on the private sector is balanced by the "inherent governmental function" policy, and the Circular in no way intends to abrogate the latter. Where agencies determine that information dissemination activities are inherently governmental, the agencies themselves should carry out the activities.

(11)(c). User Charges. The Federal Government is the sole possessor and supplier of certain types of information, which is frequently of substantial commerical value. Dissemination of such information, or its dissemination in a specific form or medium, may represent a government service from which identifiable recipients derive special benefits, in which case they may be subject to OMB Circular No. A-25, User Charges. For example, where the information is already substantially available in printed form, agencies may consider dissemination in electronic form to be a service of special benefit, the costs of which should be recovered through user charges. Many agencies do not have consistent, agency-wide policies and procedures for setting user charges for information products and services with a view to cost recovery.

Agencies must establish user charges for the costs of information dissemination, and recover such costs, where appropriate. Whether user charges are appropriate depends, in principle, on whether identifiable recipients will receive special benefits from information products and services.

The requirement to establish user charges is not, however, intended to make the ability to pay the sole criterion for determining whether the public receives government information. Agencies must balance the requirement to establish user charges and the level of fees charged against other policies, specifically, the proper performance of agency functions and the need to ensure that information products and services reach the public for whom they are intended (see Section 8a(11)(a)). If an agency has a positive obligation to place a given product or service in the hands of certain specific groups or members of the public and also determines that user charges will constitute a significant barrier to discharging this obligation, the agency may have grounds for reducing or eliminating its user charges for the product or service, or for exempting some recipients from the charge.

(12). Periodic Review and Depository Libraries. Agencies must also establish procedures for periodically reviewing their information dissemination programs. Agency information dissemination plans must ask whether the agency should disseminate a given information product or service at all; if the agency is already disseminating the product or service, reviews should ask whether the agency should continue to do so; or whether the manner or medium of dissemination is the most efficient, effective, and economical.

In addition, agencies must establish procedures to ensure compliance with 44 U.S.C. 1902, which requires that government publications (defined in 44 U.S.C. 1901 and repeated in Section 6k of the Circular) be made available to the Federal depository libraries through the Government Printing Office. The depository libraries provide a kind of information "safety net" to the public, an existing institutional mechanism that guarantees a minimum level of availability of government information to all members of the public. Providing publications to the depository library program complies with the law and costs executive agencies virtually nothing.

b. Information Systems and Information Technology Management. This subsection states policies concerning the planning, acquisition, operation, and management of Federal information systems and technology. The Federal information systems and technology budget, which was $14 billion in FY 1985, is projected to increase at a rate faster than that of the overall Federal budget. With outlays at these levels and agencies becoming increasingly dependent upon information technology to accomplish their missions, it is essential that planning processes be applied to the acquisition and application of information technology.

(1). Planning. The Paperwork Reduction Act mandates a stronger central role in information resources planning. Specifically, the Act requires that OMB: (1) publish a five-year government-wide automatic data processing and telecommunications plan; (2) review and coordinate agency proposals for the acquisition and use of information technology; and (3) promote the use of the technology to improve governmental efficiency and effectiveness. In order to meet these objectives, it is necessary to initiate a government-wide process for developing and institutionalizing information technology planning that is based in agency programs and missions. The planning must also be tied to the budget so that budgetary decisions derive from plans, and conversely, so that budgetary constraints are reflected in the plans.

The process must further ensure that ufficient information is available to the entral agencies to enable them to monitor compliance with Federal policies and identify major issues. including cross-cutting issues where more active centralized planning and management may be appropriate. Hence. agencies must institute information planning processes tied to both the conduct of programs and the preparation of the agency's budget.

(2) and (3). Management Controls and Accountability. Basic management controls for agency information systems are fundamental to sound information resources management. These controls should ensure the documentation and periodic review of major information systems. as well as periodic cost-benefit evaluation of overall information resources management in light of agency missions. In order to provide greater incentive for management efficiencies. accountability for information systems should be vested in the officials responsible for operating the programs that the systems support.

Program managers depend upon information systems to carry out their programs. and yet frequently they do not ave direct control over the technical nd operational support for those ystems. Program managers often depend upon agency computer centers or contracted service organizations. the heads of which may not be directly accountable to the program managers in a formal organizational sense. Program managers are nonetheless responsible for conducting their programs and. to the extent successful conduct of the programs entails support from information systems. program managers must be held accountable for acquiring that support. The responsibilities of program managers are therefore presumed to include securing information systems support as needed. and planning for contingencies. Technical support organizations have a concomitant responsibility to meet their commitments. contractual or otherwise. to their program clients. but the program official has the ultimate responsibility for delivering a program's product or service.

(4) and (5). Sharing Information Processing Capacity. OMB Circular No. A-121. which is rescinded and superseded. required only that the holder of excess automatic data processing capacity share such capacity. ecause the holder of excess capacity as little incentive to seek opportunities for sharing. however. the new policy requires both that the holder share capacity and that the agency seeking information processing capacity fulfill its needs from other agencies or the private sector. whenever possible. before acquiring the new capacity itself. The policy establishes an order of preference in meeting needs—look first to existing sources before acquiring new capacity—but is not intended to assert blindly that sharing or commercial sources are the sole considerations. Agencies must also consider whether existing sources are more cost effective and whether they in fact will meet agency specific needs. Procedural aspects of these policy statements are found in Appendix II.

(6) and (7). Life Cycle Costing; and Avoiding Duplication. Agencies frequently develop information technology incrementally, through a series of interim upgrades. without regard for longer term considerations such as the information systems' life cycle. As part of their planning. agencies need to consider the full information system life cycle when determining the cost of information technology. While competitive procurement is generally to be valued. its costs should be taken into account. including the cost to program effectiveness of unnecessarily lengthy procurement processes. Other conditions. such as the need for compatibility. may also be legitimate

limitations on the competitive process. Similarly, agency planning should ensure that information systems are not unnecessarily duplicative of systems available elsewhere in government or from the private sector.

(8). Software Management. The prevailing agency practice of developing customized computer software is a source of inefficiency, as the General Accounting Office and others have noted. While some agency applications can only be satisfied with customized software, the tendency to prefer custom development is excessively costly in terms of initial development, continued maintenance, and eventual conversion to new technology, because it requires the agency to bear the full cost of developing and maintaining the software it uses. While recognizing that off-the-shelf software has pitfalls, such as uncertainty of continued maintenance, managers are generally to prefer acquiring generic, off-the-shelf software available from the private sector instead of developing their own.

(9). Necessary Compatibility. Agencies often acquire technology that is incapable of communicating with other systems with which the agencies need to communicate. Compatibility among information systems has consequently emerged as a significant information resources management problem. Agencies must acquire or develop information systems in a manner that enhances necessary compatibility. The qualifier "necessary" is used because compatibility is not an unrestricted goal: information systems need to be compatible with other systems only to the extent that they must communicate with those systems.

(10) through (13). Security. Security of information systems means both the protection of information while it is within the systems and also the assurance that the systems do exactly what they are supposed to do and nothing more. Information system security entails management controls to ensure the integrity of operations including such matters as proper access to the information in the systems and proper handling of input and output. In this sense, security of information systems is first and foremost a management issue and only secondly a technical problem of computer security.

The recent introduction of smaller and more powerful computer systems and new communications technology and transmission media, together with the greater involvement of end users in managing information resources, have increased the potential vulnerability of Federal information systems and hence the level of management concern. Protecting personal, proprietary, and other sensitive data from unauthorized access or misuse; detecting and preventing computer related fraud and abuse; and assuring continuity of operations of major information systems in the event of emergency related disruptions are increasingly serious policy issues. Policy previously found in Transmittal Memorandum No. 1 to OMB Circular No. A–71 is here revised; procedural aspects of the policy are in Appendix III to the Circular.

The General Accounting Office reported in its review of the first-year implementation of the Federal Managers Financial Integrity Act (FIA) that internal controls in automatic data processing systems received inadequate coverage in FIA evaluations. GAO noted that some agencies were uncertain of the relationship between (a) OMB Circular No. A–71, Transmittal Memorandum No. 1, Security of Federal Automated Information Systems, and (b) OMB Circular No. A–123, Internal Control Systems. The relationship between security of automated information systems and agency internal control reports is now stated clearly in Appendix III.

Appendix III provides a minimal set of requirements for the security of all

Federal automated information systems. The Appendix also requires agencies to incorporate additional requirements for the security of information classified for national security purposes, in accordance with appropriate national security directives.

(14) Standards. The National Bureau of Standards, Department of Commerce, develops and issues Federal Information Processing Standards. The National Communications System develops and the General Services Administration issues Federal Telecommunications Standards. Some standards are mandatory for Federal agencies, while others are voluntary. Agencies may waive the use of Federal standards under certain conditions and pursuant to certain procedures, which vary depending upon the individual standard. In general, OMB strongly recommends use of these standards government-wide. Such standards can contribute to overall government economy and efficiency by increasing compatibility in computer and telecommunications networks, improving the transportability of software, and enabling computer systems to be developed using components of different manufacturers. These advantages can result in reduced procurement costs for equipment and services, improved competition, and better utilization of staff training and skills. While government-wide standards can result in management efficiencies, agencies should be mindful that standards can also have the untoward effects of regulations, as noted in OMB Circular No. A-119. Agencies should continuously assess relative costs and benefits of standards and their effects upon the agency's accomplishment of its mission. Note also that national security directives prescribe standards for computer security.

(15) Avoiding Information Technology Monopolies. Many agencies operate one or more central information technology facilities to support agency programs. In these agencies, program managers are often required to use the central facilities. The manager of such a monopoly facility has a lesser incentive to control costs, since he or she has a captive clientele. The program manager has little leverage to ensure that information processing resources are efficiently allocated since he or she cannot seek, or can seek only with great difficulty, alternative sources of supply. When users are dependent on effective technology support to perform their functions, control over selection of facility is essential and consistent with holding users responsible for producing their government information products. To provide incentives conducive to more businesslike procedures in information technology facilities, agencies should avoid monopolistic information processing arrangements and should enter into them only if their cost effectiveness is clear and they are subject to periodic review. Appendix II specifies certain procedures with respect to this policy.

(16) Cost Recovery. This policy constitutes a revision to policy stated in OMB Circular No. A-121. Whereas Circular No. A-121 required only that costs for automatic data processing facilities be allocated to users, agencies must now recover the costs of information technology facilities from government users. Viable management of a large information technology facility requires that managers know the amount of resources devoted to each user when providing services. Furthermore, effective management of the use of information technology requires that the user have responsibility for and control over the resources consumed by use of the facility. Experience with Circular No. A-121 showed OMB that allocating costs had little effect on agencies' behavior; recovering costs means that actual transfers of funds will take place

between suppliers and users of information technology facilities. Procedural aspects of the policy appear in Appendix II.

(17) Coordination with State and Local Governments. This policy reaffirms policy previously found in OMB Circular No. A–90. Transmittal Memorandum No. 1. The interagency group that worked on the revision of Circular No. A–90 recommended, and OMB agreed, that the Circular should be rescinded except for a single policy statement prohibiting Federal agencies from placing unnecessary restrictions on the information systems that State and local governments use to carry out federally financed program activities.

(18) Application of Up-to-date Information Technology. Recent availability of low cost, highly efficient and effective electronic information technology can greatly increase worker productivity and facilitate operation of Federal agency programs. The Circular states a predisposition, based in the Paperwork Reduction Act, in favor of applying such technology to the information life cycle within a responsible management context. Two broad areas of information technology merit further discussion: (1) electronic information collection and dissemination, and (2) end user computing.

—*Electronic Collection and Dissemination of Information.* Federal agencies are moving rapidly to provide for collection and dissemination of information through electronic media. In developing this Circular, OMB considered whether it was necessary to provide specific policies concerning electronic collection and dissemination of governmental information. OMB concluded that, except for the general predisposition in favor of applying new technological developments to information resources management, the policies that apply to information collection and dissemination in other media also apply to electronic collection and dissemination. It is important, however, that agencies recognize the necessity of systematically thinking through the application of policies stated elsewhere in this Circular to electronic collection and dissemination of information. For example, when developing electronic collection programs, agencies should give particular attention to issues such as privacy, public access, and records management. When developing electronic dissemination programs, agencies should ensure that access is provided to each class of users upon reasonable terms, avoid problems arising from monopolistic control, ensure maximum reliance upon the private sector, and take necessary steps for cost accounting and cost recovery.

—*End User Computing.* Federal agencies are also moving rapidly to acquire end user computing capabilities. OMB endorses the managed innovation approach to end user computing presented in GSA's publication Managing End User Computing in the Federal Government (June 1983). Because end user computing places management of information in the hands of individual agency personnel rather than in a central automatic data processing organization, the Circular requires that agencies train end users in their responsibilities for safeguarding information: Appendix III deals in part with the security of end user computing.

Section 9. Assignment of Responsibilities

This section assigns responsibilities for the management of Federal information resources addressed in this Circular. OMB Circular No. A–71 is rescinded and its contents are revised incorporated into this section along responsibilities assigned under the perwork Reduction Act: Section 111 of the Federal Property and Administrative Services Act, as amended; and Executive Order No. 12046. Certain assignments of responsibility from OMB to other agencies, as noted below, are also included. Following are principal noteworthy aspects of this section.

Responsibility for Managing Information Resources. Statement 9a(1) is a key element in the Circular because it establishes that the locus of responsibility for actual management of Federal information resources is the head of each agency. This means, for example, that the determination of what is "necessary for the proper performance of agency functions" with respect to information creation or collection (8a(1)) and information dissemination (8a(9)) lies with the head of the agency. In the Circular OMB sets the policy framework within which such determinations are to be made and the standards and provisions for reviewing the determinations, but the management decisions and their implementation belong properly with the agency holding the information resources.

Triennial Reviews. The Paperwork uction Act provides that the Director JMB ". . . shall, with the advice and assistance of the Administrator of General Services, selectively review, at least once every three years, the information management activities of each agency to ascertain their adequacy and efficiency." (44 U.S.C. 3513) The Administrator of Information and Regulatory Affairs, OMB, and the Deputy Administrator of the General Services Administration, in an exchange of correspondence dated June 13 and July 22, 1983, concurred that GSA has the necessary statutory authority to conduct reviews of Federal agency information resources management activities. Separate triennial reviews of agency activities by OMB and GSA would be unnecessarily duplicative, which would not be consistent with the Act. Accordingly, the triennial reviews conducted by GSA will be designed to meet OMB's requirements under the Paperwork Reduction Act as well as GSA's own needs.

Senior Officials for Information Resources Management. In accordance with 44 U.S.C. 3506(b) and 5 CFR 1320.8, agencies are required to designate a senior official to carry out responsibilities under the Paperwork Reduction Act. The designation of the official is intended to assure clear accountability for setting policy for agency information resources management activities, provide for greater coordination among the agency's information activities, and ensure greater visibility of such activities within the agency. The responsibilities of the senior official for information resources management were identified in OMB Bulletin No. 81–21, which has expired. Those responsibilities are now estabished in this Circular.

International Information Policy. The Circular deals with the management of information resources held by the Federal government. While the creation, collection, processing, transmission, dissemination, use, storage, and disposition of information by the Federal government has international ramifications, Federal government information resources management policy is not the same as "U.S. information policy," which refers to U.S. national interests in the information field vis-a-vis the policies and interests of other nations. The Circular formally acknowledges this distinction and assigns responsibilities for international information policy only insofar as it relates to Federal government information resources management policy.

Timely Technology Procurement. Inherent in effective management of information technology is the ability of program managers to acquire technology in a timely manner. GSA is assigned the responsibility in Section 9 to develop criteria that will streamline procurement procedures and delegate procurement authority to agencies that comply with those procedures. All Federal agencies are directed in Section 9 to develop internal policies and procedures that further provide for timely acquisition of information technology.

Records Management. The Paperwork Reduction Act makes the management of Federal records an integral part of information resources management. While no new policies are embodied in this Circular, responsibilities have been assigned in order to ensure that agency records management programs are considered within the context of Federal information resources management.

Section 10. Oversight

The broad scope of the Circular dictates a strategy of focusing oversight on a series of aspects of information resources management rather than on a single comprehensive reporting scheme. OMB intends to use existing mechanisms, such as the fiscal budget, information collection budget, and management reviews, to examine agency compliance with the Circular. For example, during 1984 the management reviews for the FY 1986 budget year concentrated on five cross-cutting information issues: overall information resources management strategy, telecommunications, software management, "electronic filing," and end user computing. OMB issued data call bulletins requesting information specific to these issues, targeted the issues for special attention during the management reviews, and requested individual agencies to submit management improvement plans on specific aspects of the issues. Pursuit of this kind of selective oversight strategy permits OMB and the agencies the flexibility to shift the focus of oversight as information issues and the technological environment change.

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[Editorial Note: This reprint incorporates a correction that is published in the Federal Register of Monday, January 6, 1986.]

Office of Management and Budget

Final Guidance Interpreting the Provisions of Public Law No. 100-503, the Computer Matching and Privacy Protection Act of 1988, 54 Fed. Reg. 25818 (June 19,1989)

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

JUN 14 1989

OFFICE OF MANAGEMENT AND BUDGET

Privacy Act of 1974; Final Guidance Interpreting the Provisions of Public Law 100-503, the Computer Matching and Privacy Protection Act of 1988

Agency: Office of Management and Budget

Action: Issuance of Final Guidance

Summary: These Guidelines implement the provisions of P.L. 100-503, the Computer Matching and Privacy Protection Act of 1988. This Act amends the Privacy Act of 1974 to establish procedural safeguards affecting agencies' use of Privacy Act records in performing certain types of computerized matching programs. The Act requires agencies to conclude written agreements specifying the terms under which matches are to be done. It also provides due process rights for record subjects to prevent agencies from taking adverse actions unless they have independently verified the results of a match and given the subject 30 days advance notice. Oversight is accomplished in a variety of ways: by having agencies (a) publish matching agreements, (b) report matching programs to OMB and Congress; and (c) establish internal boards to approve their matching activity. The Act becomes effective on July 19, 1989.

Effective Date: These Guidelines are effective upon publication.

For Further Information Contact: Robert N. Veeder, Office of Management and Budget, Office of Information and Regulatory Affairs, Information Policy Branch, Telephone (202)395-4814.

Supplementary Information: P.L. 100-503, the Computer Matching and Privacy Protection Act of 1988 was enacted on October 18, 1988. It will become effective on July 19, 1989. The Act requires OMB to issue guidance on interpreting and implementing its provisions no later than the eighth month after enactment, or June 19, 1989.

On April 19, 1989, OMB published for public comment proposed interpretive guidance. The notice especially invited comment on the applicability of the Act to two examples of matching activity:

o The entering of information received orally into an automated data base for the purpose of determining eligibility for a Federal benefit;

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- The automation by a Federal agency of data from a Federal non-automated system of records.

The proposal also solicited examples of routine administrative matches using Federal personnel or payroll records that should be excluded from the Act's coverage, and matches for which Data Integrity Boards should waive the Act's benefit/cost requirement.

At the expiration of the comment period, OMB had received comments from 42 respondents. These fell into five categories:

- The Congress (2)
- Federal agencies (24)
- State agencies (14)
- Public Interest Groups (1)
- Public Employee Unions (1)

In addition to providing comments on the specific areas requested, most commentators also chose to comment more broadly on the guidance.

Although the following guidance is published in final form, OMB realizes that the implementation of this complex Act will undoubtedly require the issuance of additional and clarifying guidance and intends to monitor the agencies implementation closely to that end.

Section By Section Analysis

Section 5a(1)(a). Matching Program Definition.

Caution Against Eluding the Act's Requirements.

Several commentators advised OMB to explicitly warn agencies, both Federal and State, against engaging in sophistry or subterfuge, to avoid the reach of the Act. They pointed out, for example, that a Federal agency might combine two disparate systems of records containing payroll and personnel records of Federal employees into a single system and match data sets within the new system. This activity would not be covered, although a match between the two separate systems would have been. In other cases, agencies might convert automated records to paper records to perform a manual match, albeit one of more limited scope. OMB thinks these recommendations are pertinent and has added cautionary advice to the matching program definition section to caution agencies not to engage in activities intended to frustrate the normal application of the Act.

Distinction between Federal to Federal and Federal to Non-federal Matches.

OMB, in making a literal interpretation of the statutory definition of a matching program, distinguished between

Federal-to-Federal and Federal-to-non-Federal matches. In the former case, the necessary components were that there were two or more automated systems of records and that the comparison of records in these systems was done via a computer. This is essentially the classic definition of a matching program that OMB put forth in guidance issued in 1979 and revised in 1982. It is the definition that the General Accounting Office has asserted in its study of the costs and benefits of conducting matching programs: Computer Matching: Assessing its Costs and Benefits, GAO/PEMD-87-2, November 1986.

In defining the Federal/non-Federal match, however, OMB read the statute as applying to both automated and non-automated records so long as the comparison was done via computer. Several commentators objected to placing a heavier administrative burden on State and local agencies engaged in matching with Federal agencies than on Federal agencies matching with each other. One commentator suggested that the OMB reading was in error and that the modifier "automated" could properly and reasonably be read as modifying all of the data bases involved.

Other commentators pointed out that the clear intent of the Act was to deal with situations where large numbers of individuals were subjected to automated scrutiny with potentially adverse consequences, and that in actual practice, that meant automated comparisons of automated data bases. Certainly the Privacy Act itself contains an expression of Congressional concern on precisely this point: that use of computers could "greatly magnify the harm" to an individual.

After careful consideration of these arguments, OMB has revised the definition to clarify that in both Federal-to-Federal and Federal-to-non-Federal matching programs what is involved is the automated comparison of two or more automated record sets, whether systems of records or non-Federal records. In taking this position, OMB is extremely concerned that agencies not adopt data exchange practices that deliberately avoid the reach of the Act where compliance would otherwise be required. The guidance has been revised to cite this concern and give examples of such improper practices.

State Agencies' Concerns.

A number of State respondents asserted that matches between the Social Security Administration and State agencies in which SSA merely provided information with which to update a benefits file to reflect an across-the-board cost-of-living allowance change should not be considered a matching program under the Act. They asserted that the match, if one occurred, was really done at SSA, and disclosure to the States of COLA information did not involve a computerized comparison of two independent record sources. OMB is sympathetic to the concerns of the States, but unpersuaded by this analysis. The record as maintained by the State agency is a State record, not a Federal record. The matching process involves comparing information provided by a Federal source to that record using a computer to perform the comparison. There are potentially adverse consequences for the record subject. Eligibility for a Federal benefit program is involved. Clearly, this is a Federal-to-non-Federal matching program contemplated by the Act.

It should be noted that States are free to update their files for across-the-board cost-of-living adjustments without matching with Federal records. Since the COLA percentages are known in advance, are uniform, and are automatic, States can compute these COLA's themselves. Actions taken based on benefit levels recomputed by the States without the involvement of a Federal system of records matching program would be subject to the laws and regulations governing such programs rather than the Matching Act.

An additional State concern relates to how to conduct the independent verification required by the Act for these kinds of matches. That is discussed below.

Entering of Information Received Orally.

A final consideration in the definition of what constitutes a matching program for purposes of the Act is the response of the commentators to specific questions OMB raised in its proposed guidance. Specifically, we asked whether when a State benefits clerk takes information received orally from an applicant and enters it into an automated Federal Privacy Act system of records the provisions of the Matching Act come into play. A majority of respondents thought that to the extent that no record existed at the State level, such a query would not be covered. However, if the query produced a record that the State would ultimately maintain, it was covered. Since it is unlikely that a State would never memorialize such a query, this issue is perhaps more academic than real. In any case, the guidance has been amended to add this example.

Section 5a(1)(d). Matching Purpose.

Elements of Matching Purpose.

Several commentators found OMB's discussion of the elements of the purpose section less clear than OMB intended. The section has been redrafted.

Ultimate Purpose.

Two commentators took exception to OMB's assertion that peripheral consequences of a matching program, even if having an ultimate adverse result, could be discounted in determining whether a match was covered. They urged instead that OMB broadly construe the purpose section to take in the ultimate purpose of the match (by which OMB assumes they mean any ultimate consequence, whether intended or unintended). OMB is unpersuaded by this rationale. The thrust of the Act is to cover matching programs whose purpose is clear and deliberate and intended to accomplish one of three stated purposes: to determine eligibility for a Federal benefit, compliance with benefit program requirements, or to effect recovery of improper payments or delinquent debts from current or former beneficiaries. The more tenuous the nexus between the operation of the program and these purposes is the harder it is to find any applicability of the Act. Having said that, however, OMB remains concerned that agencies not avoid the reach of the Act by disguising the real purpose of their matching programs.

Section 5a(3). Exclusions From The Matching Definition.

Statistical Matches for Research Purposes.

Two commentators criticized the inclusion of "pilot matches" in this excluded category. In the past, agencies have done pilot matches using a small data subset to determine whether it would be productive to perform a match of the entire dataset. Given the requirement in the Act for benefit/cost analysis, OMB thinks that pilot matches are a reasonable approach to determining whether to engage in a broader matching activity. OMB does not think that this kind of information gathering activity should be subject to the administrative requirements that attach to regular matches so long as the agency keeps these matches solely in a statistical information gathering channel. Nevertheless, OMB is sensitive to the concerns raised and has amended the guidance to require Data Integrity Board approval of all pilot matches. It is at this point that the Board can decide whether to conduct a matching program and comply with the Act's full requirements, or a pilot program. If a full matching program, the results of the match may be used to take adverse action. If a pilot program, they may not.

Law Enforcement Agency Exclusion.

One agency recommended that the guidance specifically cite the Inspector General (IG) as a law enforcement agency. OMB failed to realize that commentators would be unaware that the Inspector General Act gave the Inspector criminal law enforcement responsibilities. While we are hesitant to include a comprehensive list of eligibles we have amended the guidance to cite that part of the IG office that performs criminal law enforcement activities as eligible for the exclusion.

Two commentators were concerned that the proposed guidance on the law enforcement exclusion was too brief. OMB has expanded the discussion in the final version to make it clear that that exception may only be taken by an agency or component that is designated by statute (either Federal or State) as having a criminal law enforcement responsibility as its primary purpose and that it may only claim the exclusion after the initiation of an investigation of a named person or persons in order to gather evidence.

Routine Administrative Matches Involving Federal Personnel Records.

One commentator suggested that OMB define the word "predominantly" as used in the exclusion. OMB has included a definition of this word to mean that the data base either be established to contain records about Federal employees, or that the majority of records in the data base be about such employees.

Two commentators urged that OMB provide additional examples of what is covered by the exclusion. OMB has amended the guidance to reflect this consideration.

Section 5a(1)(c). Federal Benefit Program.

Former Beneficiaries.

One commentator noted that the guidance was silent as to the Act's coverage of former beneficiaries and urged that OMB explicitly cite them. OMB agrees. The Act provides as one of its purposes the recouping of Federal benefits payments. Certainly this process could involve those who are no longer beneficiaries but remain in default. The guidance has been amended to include this category of beneficiaries.

Section 5a.b.c. Agency Responsibilities/Definitions

Expand Discussion of Agencies' Roles/Responsibilities.

Several commentators suggested that OMB expand the definition section to clarify the roles and responsibilities of the recipient, source, and Non-Federal agencies, especially in terms of which is responsible for publishing matching notices in the Federal Register. OMB agrees and has expanded this section.

Section 6a. Giving Prior Notice

Direct Notice Only.

One commentator strongly urged OMB to state that the Act requires direct notice to the record subject, and that Federal Register constructive notice is insufficient to meet this requirement. OMB has considered this comment, and agrees that the section requires direct notice at the time of application. It does not, however, require direct notice at other times. Examination of the statutory wording shows that the Act calls merely for "notice" subsequent to the direct notice at the time of application. This is understandable, since the point at which it is most critical to provide notice is at the point when the individual has the option of providing or withholding information. Notice at this point permits the applicant to make an informed choice about participating. Moreover, for matching programs whose purpose is to locate individuals in order, for example, to recoup payments improperly granted, direct notice may well be impossible. OMB thinks that the guidance as written gives agencies the flexibility to deal with the many circumstances involved in conducting matching programs. However, OMB intends to monitor agencies' activities to ensure that constructive notice does not become an administratively convenient substitute for direct notice when direct notice is achievable without an unreasonable expenditure of resources.

Cite Section (e)(3) Requirement.

Two commentators cited the Privacy Act's (e)(3) notice as one appropriate place for the matching notice and urged OMB to cite it as such in the guidance. OMB agrees and has done so.

Federal/state Responsibilities.

One State agency asserted that the Federal agency should do the notice. OMB thinks that if a Federal form is involved in the application for a benefit, it is within the power of the Federal agency creating the form to provide the notice and it should do so. For periodic notice, however, Federal agencies may wish to accomplish this requirement through the State or local governmental benefit providers. OMB has included a discussion of this issue in the section on agency definitions and roles and responsibilities.

Section 6b. Constructing Matching Agreements

Existing Agreement Carryover.

One commentator suggested that the guidance assert that existing agreements could suffice until the program was due for renewal and only at that time should they be revised to include the terms of the Matching Act. Similarly, a State commentator suggested that the existing State/Federal agreements should be sufficient. It is OMB's interpretation that the statute clearly requires that by the effective date of the Act, any matching programs conducted by an agency must have agreements approved by the Data Integrity Boards. The statute sets out the terms of those agreements. To the extent that existing agreements include these elements, they will suffice. If they do not, any missing elements must be agreed to by the participants.

Duplication and Redisclosure.

Two commentators strongly urged OMB to expand the discussion of this section to substantially restrict any subsequent use of the matching data by the recipient agency. Both cited the "essential purpose" wording of the statute as being more restrictive than the "compatibility standard" that applies to routine use disclosures. OMB agrees and has expanded the discussion of this point in the guidance.

Section 6b. Publication Requirements

Inclusion of System(s) of Records.

One commentator suggested that the matching notice identify the system or systems of records from which records will be matched. OMB agrees and has adopted this suggestion.

Section 6f. Independent Verification, Notice And Wait Period,

Opportunity To Contest Adverse Finding.

Combining the Independent Verification and Statutory Notice Requirements.

Federal benefits program matching as well as the matching of Federal employee records occurs across a wide spectrum of purposes and consequences. It would be of dubious utility to apply the verification requirements equally to all matches and argue that a match that results in an adverse consequence of the loss of, for example, a tuition assistance payment should receive the same due process procedures as one that results in the loss of an AFDC payment or Food Stamp Program eligibility. This is not to say that agencies can ignore or minimize these requirements for matches that result in less severe consequences; but only that they should bring some degree of reasonableness to the process of verifying data.

Conservation of agency resources dictates that the procedures for affording due process be flexible and suited to the data being verified and the consequence to the individual of making a mistake. In some cases, if the source agency has established a high degree of confidence in the quality of its data and it can demonstrate that its quality control processes are rigorous, the recipient agency may choose to expend fewer resources in independently verifying the data than otherwise. Indeed, several commentators urged OMB to make it clear that in certain circumstances, the verification and notice and wait steps can be combined into one. OMB agrees and has amended the Sections to permit this occurrence; but, to make it clear that agencies should think through carefully when to use this compression and not consider it a routine process. To ensure that this consideration takes place, OMB has amended the guidance to require that the Data Integrity Boards make a formal determination of when to compress these two due process steps. OMB will collect these decisions as part of the reporting process.

Time Period for Notice.

One commentator suggested that because the waiting period provided by the Matching Act was 30 days (or more if program statutes or regulations provided a longer period), the guidance should reflect this minimum period and not arbitrarily add transit time. On reflection, OMB agrees and has amended the section.

Coercing Record Subjects.

One commentator expressed concern lest agencies attempt to coerce subjects into accepting the agencies adverse finding. The solution offered was to prohibit agencies from taking any action until the expiration of the 30 days notice and wait period. In order to forestall some speculative behavior on the part of the agency, this solution could put the government in the position of providing a benefit it knows improper to a recipient who has acknowledged his ineligibility. OMB has not adopted the suggestion but has included a caution to agencies against coercing individuals into agreeing with the finding.

Section 7a. Data Integrity Board Operation

Location.

Two commentators were unclear about whether State and local agencies were required to have such boards. OMB has amended the guidance to make it clear that the Data Integrity Board requirement applies only to Federal agencies. Another commentator suggested that having approval by both a source and a recipient Board was unnecessary. OMB disagrees. A significant purpose of the Act is to ensure that all parties to a matching program have enough information to make a reasoned decision about participating and that each understands the process whereby the data will be matched. One should note that there are civil remedies provisions in the Privacy Act as well as criminal penalties for wrongful acts. It is in the interest of all parties to ensure that the Privacy Act requirements are adequately met.

Operation.

One commentator urged OMB to flatly prohibit delegation of approval of matching agreements. OMB agrees and has amended the guidance to make it clear that approvals (and denials) must be done by the Board itself. Another commentator suggested OMB establish a time limitation for Board determinations. OMB thinks this is a management matter best left to agency discretion but has added an instruction to agencies that they ensure expeditious consideration.

Review and Reports.

One commentator recommended OMB expand the review and report requirements of the Data Integrity Boards. OMB agrees but is in the process of revising Circular No. A-130, Appendix I, to include these requirements. The commentator also suggested that

OMB tell agencies to treat the annual review period as beginning on the effective date of the Act. OMB will include this suggestion in the revision.

Section 7c. Benefit Cost Requirement

Waivers of Requirement.

One commentator recommended that OMB make it clear that the benefit-cost requirement be waived for matches done either pursuant to a statutory requirement or for a law enforcement purpose. OMB disagrees. The statute permits waiver for statutory matches, but only for the first year. The intent of the drafters was to recognize that the presumption the Act imposes of a favorable benefit-cost ratio was irrelevant in the face of a statutory mandate to match. Nevertheless, the Act requires a benefit-cost determination in subsequent years in order to provide information to Congress about required matches that are not achieving a cost-beneficial result. As to law enforcement matches, the statute alrady excludes a significant portion of such matches from all of the Act's requirements. Another commentator recommended that the requirement for all matches done to recoup payments be waived since the results, i.e., ultimate recoveries, are generally uncertain. This suggestion brings up an important point about conducting these assessments: there will be a range of data available to agencies in performing benefit-cost analysis, some of which will be helpful and some of which will be merely speculative. Where data in an agency's hands clearly indicates an unfavorable ratio, prudent management dictates abandoning the match. Where the reverse is true, agencies should conduct the match. Where the data is unclear, agencies should gather data to permit a better analysis. This may mean conducting a program on the basis of data that, while speculative, suggests that the result will be favorable, and then subjecting the results of the match to careful analysis to determine if that is the case. OMB expects that for the first year, benefit-cost analysis will be a less rigorous process than for subsequent years.

Two commentators suggested that waivers be granted only where the analysis was impossible to do or would be unhelpful. OMB has not adopted this suggestion finding this standard to be too subjective to provide a solid basis on which to waive the requirement. OMB will include as a reflection of Congressional intent, a statement that waivers should be granted sparingly if at all.

Benefit-cost Checklist and Methodology.

Two commentators urged that a checklist providing a step-by-step methodology for accomplishing benefit-cost analysis be appended to the guidance. OMB agrees that this should be done and is working on such a checklist but is doubtful that it will be ready in time to be added to the final guidance. Rather than delay publication past the statutory deadline, OMB will issue the checklist as soon as it is available in the same manner as it issues the guidance itself. OMB will also cite the GAO Report, Computer Matching: Assessing its Costs and Benefits, GAO/PEMD-87-2, November 1986, in the Section.

Other Comments

Disclosures for Matching.

Several commentators urged OMB to discuss the ways in which records could be disclosed for a matching program. One in particular wanted to know if there was an exception in section (b) of the Privacy Act for matching disclosures. OMB has added a discussion of the procedural requirements to the matching agreements section. It notes that agencies must find an exception to the written consent rule in section (b) or obtain the written consent of the record subject to the disclosure; there is no specific exception for a matching program.

Denial of an IG Proposal.

One commentator urged that the guidance make it clear that disapproval of an Inspector General proposed match could take place only because of a defect in the matching agreement. OMB agrees that the proper role of the Board is not to engage in management decisions about the utility of conducting matching programs, but to ensure that such programs are carried out in strict compliance with the terms of the Privacy Act, as amended by P.L. 100-503, and "all relevant statutes, regulations and guidelines." Nevertheless, it is the responsibility of the Board to ensure that each of the terms of the agreements are complied with. That determination may require them to go beneath the written agreement to examine the matching process itself. For example, if the agreement indicates that matching subjects have been given individualized notice at the time of the application on the application form itself, the Board may wish to examine the form to see if this notice is adequate.

Training.

One commentator suggested that OMB set up training in the Act's provisions. OMB agrees and is working on a training program that will address this suggestion.

Office of Management and Budget Guidelines on the Conduct of Matching Programs

1. **Purpose**: These Guidelines augment and should be used with the "Office of Management and Budget (OMB) Guidelines on the Administration of the Privacy Act of 1974," issued on July 1, 1975, and supplemented on November 21, 1975, and Appendix I to OMB Circular No. A-130, published on December 24, 1985, (see 50 FR at 52738). They are intended to help agencies relate the procedural requirements of the Privacy Act (as amended by P.L. 100-503, the Computer Matching and Privacy Protection Act of 1988 -- hereinafter referred to as the Computer Matching Act), with the operational requirements of automated matching programs. These are policy guidelines applicable to the extent permitted by law. They do not authorize activities that are not permitted by law; nor do they prohibit activities expressly required to be performed by law. Complying with these Guidelines, nonetheless, does not relieve a Federal agency of the obligation to comply with the provisions of the Privacy Act, including any provisions not cited in these Guidelines.

2. **Authority**: Section 6 of P.L. 100-503, The Computer Matching and Privacy Protection Act of 1988, requires OMB to issue implementation guidance on the Amendments.

3. **Scope**: These guidelines apply primarily to all Federal agencies subject to the Privacy Act of 1974. For this purpose, the Privacy Act relies upon the definition in the Freedom of Information Act (FOIA) 5 U.S.C. 552 at (e): "any executive department, military department, government corporation, government controlled corporation, or other establishment in the executive branch of the government (including the Executive Office of the President), or any independent regulatory agency." For the purposes of these guidelines, components of departments, e.g., the Health Care Financing Administration of the Department of Health and Human Services, are not considered individual agencies.

Note that the definition incorporates the "agency" definition used in the Administrative Procedure Act (5 U.S.C. 551 at (1)) which also contains a series of categories that are not covered, including State and local governments.

The Computer Matching Act amendment, however, brings State and local governments within the ambit of the Privacy Act when they are engaging in certain types of matching activities; but only in conjunction with a Federal agency that is itself subject to the Privacy Act, and only when a Federal system of records is involved in the match.

In general, a State or local agency or agent thereof, that is either: (1) providing records to a Federal agency for use in a matching program covered by the Act; or (2) receiving records from a Federal agency's system of records for use in a matching program covered by the Act, must comply with certain of the Act's provisions. What State and local governments must do to meet the requirements of the Act is explained in paragraph 9 below.

4. **Effective Date**: These guidelines are effective on the date of issuance.

5. **Definitions**: The Computer Matching Act is an amendment of the Privacy Act of 1974 and the provisions of the former should be read within the context of the latter, and all the terms originally defined in the Privacy Act of 1974 apply.

It is especially important to note that the Computer Matching Act does not extend Privacy Act coverage to those not originally included. Thus, the subjects of Federal systems of records covered by the Computer Matching Act are "individuals," i.e., U.S. citizens and aliens lawfully admitted for permanent residence.

Two definitions that are especially relevant to matching programs are:

- **"Record"** which the Privacy Act defines as an item of information about an individual, including his or her name or some other identifier; and,

- **"System of Records"** which is a collection of such "records" from which an agency retrieves information by reference to an individual identifier.

In addition, the Computer Matching Act provides the following new terms:

a. **Matching Program**. At its simplest, a matching program is the comparison of records using a computer. The records must themselves exist in automated form in order to perform the match. Manual comparisons of, for example, printouts of two automated data bases, are not included within this definition. Note, however, participating agencies should not create data sharing methods merely to avoid the reach of the Act where the Act's application would otherwise be reasonable and proper. A matching program covers not only the actual computerized comparison, but the investigative followup and ultimate action, if any.

The Computer Matching Act covers two kinds of matching programs: (1) matches involving Federal benefits programs and, (2) matches using records from Federal personnel or payroll systems of records.

(1) **Federal Benefits Matches**. The Act defines a Federal benefits matching program as:

> "any computerized comparison of two or more automated systems of records or a system of records

> with non-Federal records, by applicants for, recipients or beneficiaries of, participants in, or providers of services with respect to, cash or in-kind assistance or payments under Federal benefit programs...[i.e., any program administered or funded by the Federal government, or by any agent or State on behalf of the Federal government, providing cash or in-kind assistance in the form of payments, grants, loans, or loan guarantees to individuals],...for the purpose of establishing or verifying the eligibility of or continuing compliance with statutory and regulatory requirements, or [for the purpose of] recouping payments or delinquent debts under such Federal benefit programs." (see 5 U.S.C. 552a(a)(8) and (12)).

The elements of this definition are discussed below:

(a) Computerized Comparison of Data. The record comparison must be a computerized comparison involving records from:

- Two or more automated systems of records (i.e., systems of records maintained by Federal agencies that are subject to the Privacy Act); or,

- A Federal agency's automated system of records and automated records maintained by a non-Federal (i.e., State or local government) agency or agent thereof. To be covered, matches of these records must be computerized. Some examples of computerized matches include the following:

A State benefits clerk accesses an automated Federal system of records and enters data received from an applicant and maintained in automated form by the State. The clerk matches this information with the Federal information, makes an eligibility determination and updates the State data base.

A State benefits clerk enters data about applicants for a Federal benefit program into an automated data base. At the end of the week, the State agency sends current applicant tapes to the Federal benefits agency which matches them against its own automated system of records and reports the results to the State.

A Federal agency operating a benefits program sends a tape of defaultors to the Office of Personnel Management to match against an OPM automated system of records containing information about Federal retirees in order to locate defaultors.

(b) Categories of Subjects Covered. The Computer Matching Act provisions cover only the following categories of record subjects:

- Applicants for Federal benefit programs (i.e., individuals initially applying for benefits);

- Program beneficiaries (i.e., individual program participants who are currently receiving or formerly received benefits);

- Providers of services to support such programs (i.e., those who are not the primary beneficiaries of Federal benefits programs, but may derive income from them -- health care providers, for example).

(c) **Types of Programs Covered**. Only Federal benefit programs providing cash or in-kind assistance to individuals are covered by this definition. State programs are not covered. Federal programs not involving cash or in-kind assistance are not covered. Programs using records about subjects who are not individuals as defined by Section (a)(2) of the Privacy Act -- U.S. citizens or aliens lawfully admitted for permanent residence -- are not covered.

(d) **Matching Purpose**. The match must have as its purpose one or more of the following:

- Establishing or verifying initial or continuing eligibility for Federal benefit programs; or,

- Verifying compliance with the requirements -- either statutory or regulatory -- of such programs; or,

- Recouping payments or delinquent debts under such Federal benefit programs.

It should be noted that the four elements (i.e., computerized comparison, categories of subjects, Federal benefit program, and matching purpose) all must be present before a matching program is covered under the provisions of the Computer Matching Act. Thus, for example, if the Department of Education matched a student loan recipient data base with a Veterans Administration (VA) education benefit recipient data base for the purpose of ensuring that both agencies were maintaining the most current and accurate home address information, that would not be covered since the "matching purpose" is not one of the three enumerated above. If, however, the purpose of the match were to identify recipients who were receiving benefits in excess of those to which they were entitled, the match would be covered.

Moreover, elements that are peripheral to the match, even if within the definitions above will not raise a match to the Act's coverage. For example, the Federal Parent Locator Service conducts matches to locate absentee parents who are not paying child support. Such matches may result in the identified spouse being ordered to commence payments, and some of those payments may go to recoup payments made from a Federal benefit program such as Aid to Families with Dependent Children. Because the recoupment is not the primary purpose of the match, but only an incidental consequence, such matches would not be covered.

(2) **Federal Personnel or Payroll Records Matches**. The Computer Matching Act also includes matches comparing records from automated Federal personnel or payroll systems of records, or such records and automated records of State and local governments. Again, it should be noted that the comparison must be done by using a computer; manual comparisons are not covered. Matches in this category must be done for other than "routine administrative purposes" as defined in paragraph 5a(3)(e) below. In some instances, a covered match may take place within a single agency. For example, an agency may wish to determine whether any of its own personnel are participating in a benefit program administered by the agency, and are not in compliance with the program's eligibility requirements. This internal match will certainly result in an adverse action if ineligibility is discovered. Therefore, it is covered by the requirements of the Computer Matching Act. Again, agencies should not attempt to avoid the reach of the Act by, for example, improperly combining dissimilar systems into a single system, matching data within the system to make an eligibility determination, and arguing that the match is not covered because only one system of records is involved.

(3) **Exclusions from the Definition of a Matching Program**. The following are not included under the definition of matching programs. Agencies operating such programs are not required to comply with the provisions of the Computer Matching Act, although they may be required to comply with any other applicable provisions of the Privacy Act.

(a) **Statistical Matches Whose Purpose is Solely to Produce Aggregate Data Stripped of Personal Identifiers**. This does not mean that the data bases used in the match must be stripped prior to the match, but only that the results of the match must not contain individually identifiable data. Implicit in this exception is that this kind of match is not done to take action against specific individuals; although, it is possible that the statistical inferences drawn from the data may have consequences for the subjects of the match as members of a class or group. For example, a continuing matching program that shows one geographical area consistently experiencing a higher default rate than others may result in more rigorous scrutiny of applicants from that area, but would not be a covered matching program.

(b) **Statistical Matches Whose Purpose is in Support of Any Research or Statistical Project**. The results of these matches need not be stripped of identifiers, but they must not be used to make decisions that affect the rights, benefits or privileges of specific individuals. Again, it should be noted that this provision is not intended to prohibit using any data developed in these matches to make decisions about a Federal benefit program in general that may ultimately affect beneficiaries.

(c) **Pilot Matches**. This exclusion could also cover so-called "pilot matches," i.e., small scale matches whose purpose is to gather benefit/cost data on which to premise a decision about engaging in a full-fledged matching program. Because of concern about possible misuse of these matching programs to avoid full compliance with the Matching act, OMB will require that pilot matches must be approved by the agency Data Integrity Boards. It is at this point that the agency can decide whether to conduct a statistical data gathering match without consequences to the subjects or a full-fledged program where results will be used to take specific action against record subjects.

(d) **Law Enforcement Investigative Matches Whose Purpose is to Gather Evidence Against a Named Person or Persons in an Existing Investigation**. Certain matches performed in support of civil or criminal law enforcement activities that otherwise would be covered because they seek to establish or verify Federal benefit eligibility or use Federal personnel or payroll records, are excluded from coverage by this section. To be eligible for exclusion, the match must be done by an agency or component whose principal statutory function involves the enforcement of criminal laws, i.e., an agency that is eligible to exempt certain of its record systems under Section (j)(2) of the Privacy Act such as the Federal Bureau of Investigation, the Drug Enforcement Agency, or components of agencies' Office of Inspectors General.

The match must flow from an investigation already underway which focuses on a named person or named persons; "fishing expeditions" in which the subjects are identified generically as "program beneficiaries," are not eligible for this exclusion (note that the investigation may be into either criminal or civil law violations). The use of the phrase "person or persons" in this context broadens the exclusion to include subjects that are other than "individuals" as defined by the Privacy Act. Thus, for example a business entity could be the named subject of the investigation, while the records matched could be those of customers or clients. This does not mean however, that the rights afforded by the Privacy Act are extended by this section to other than "individuals."

Finally, the match must be for the purpose of gathering evidence against the named person or persons.

(e) **Tax Administration Matches**. There are four specific categorical exclusions for matches using "tax information." While that term is not defined in the Computer Matching Act, the Report accompanying the House version of the Act, H.R. 4699, cites "tax returns" and "tax return information" as the tax information that is covered by the exclusion. Those terms are defined in Section 6103 of Title 26 U.S.C. at (b)(1)-(b)(3). It is clear from these sections that the information covered is under the control of the Internal Revenue Service (IRS) of the Department of the Treasury since the definitions speak of information that is "filed with the Secretary" or "received by, prepared by, furnished to, or collected by the Secretary." Moreover, Section 6103(a) prohibits Federal, State and local governmental employees from disclosing tax information except as authorized by the Internal Revenue Code. This is not to say that all information in the possession of the IRS is covered by the exclusion; only tax information. Thus, for example, personnel records relating to the management of the IRS workforce would not be covered.

The exclusion covers the following:

- Matches done pursuant to Section 6103(d) of the Tax Code. These matches involve disclosures of taxpayer return information to State tax officials. For matches covered by this exclusion, neither the Federal disclosing entity nor the State recipient need comply with the provisions of the Computer Matching Act.

- Matches done for the purposes of "tax administration" as that term is defined in Section 6103(b)(4) of the Internal Revenue Code: "The term 'tax administration' means the administration, management, conduct, direction, and supervision of the execution and application of the internal revenue laws or related statutes (or equivalent laws and statutes of a State) and tax conventions to which the United States is a party; and the development and formulation of Federal tax policy relating to existing or proposed internal revenue laws, related statutes, and tax conventions; and includes assessment, collection, enforcement, litigation, publication, and statistical gathering functions under such laws, statutes or conventions." While this definition is very broad and covers a great deal of discretionary activities on the part of IRS management, it is not intended to exempt all IRS activities from the Act's coverage; only those that truly relate to administration of the nation's tax system (as opposed to management of the IRS workforce, for example). Thus, the exclusion will permit the IRS to continue to match tax returns with interest and dividend statements, for example. It should be noted that the Bureau of Alchohol, Firearms, and Tobacco of the Treasury Department also has collection and enforcement authority under the Internal Revenue Code, and tax administration is, therefore, a part of that agency's responsibilities as well.

- Tax refund offset matches done pursuant to the Deficit Reduction Act of 1984 (DEFRA). That Act contains procedures for affording matching subjects due process that are analogous to those contained in these guidelines.

- Tax refund offset matches conducted pursuant to statutes other than the DEFRA provided OMB finds the due process provisions of those statutes "substantially similar" to those of the DEFRA. OMB will periodically revise these guidelines to add such programs as such statutes are enacted. Agencies should notify OMB promptly when they think an existing statute provides an exemption in this category.

(f) **Routine Administrative Matches Using Federal Personnel Records**. These are matches between a Federal agency and other Federal agencies or between a Federal agency and non-Federal agencies for administrative purposes that use data bases that contain records predominantly relating to Federal personnel. The term predominantly means that the percentage of records in the system that are about Federal employees must be greater than of any other category therein contained. In some cases, Federal employees will predominate because of absolute numbers; in others, because they represent the largest single category. The term "federal personnel" is defined by the Act as: "officers and employees of the Government of the United States, members of the uniformed services (including members of the Reserve components), individuals entitled to receive immediate or deferred retirement benefits under any retirement program of the Government of the United States (including survivor benefits)." It should be noted that by including individuals eligible for survivor benefits in the category, the Act covers individuals who may never have been employed by the Federal government.

Matches whose purpose is to take "any adverse financial, personnel, disciplinary or other adverse action against Federal personnel..." whose records are involved in the match, are not excluded from the Act's coverage.

Examples of matches that are excluded include an agency's disclosure of time and attendance information on all agency employees to the Department of the Treasury in order to prepare the agency's payroll; or disclosure of Department of Defense (DoD) Reserve Officer identifying information to a State in order to validate and update addresses of Reservists residing in the State; or disclosure of retiree annuity files from the DoD to the Department of Veterans Affairs in order to determine the percentage of total annuity each agency is responsible for paying.

Note that this exclusion does not bring under the Act's coverage matches that may ultimately result in an adverse action. It only requires that their purpose not be intended to result in an adverse action. Thus, in the DoD/State reservist match example, the consequence of the match may well be that a reservist is dropped from the program because no address can be found for him or her. This result, however negative, would not bring the match under the Act's coverage since its primary purpose was only to update an address listing.

(g) **Internal Agency Matches Using Only Records From the Agency's System of Records**. Internal agency matching is excluded on the same basis as Federal personnel record matching above: provided no adverse intent as to a Federal employee motivates the match. Section (b)(1) of the Privacy Act permits agencies to disseminate Privacy Act records to agency employees on an official need-to-know basis. This exclusionary provision does not disturb that principle, except where Federal personnel records are involved. Thus, for example, the Social Security Administration could match with the Health Care Financing Administration to detect and ultimately recoup overpayments for a specific Department of Health and Human Services program. That match would not be covered by the provisions of the Computer Matching Act.

Moreover, the mere presence of Federal employee records in the data bases being matched would not necessarily bring the match under the Act's coverage. To be covered, the records would have to be predominantly those relating to Federal employees and the primary intent would have to be to take an adverse action of some kind against the Federal employees specifically. If the Department of Education matched its student loan defaulter file against its own employee data base in order to detect and take action against Education employees who have defaulted, that match would be covered by the Act. The same department matching its undergraduate student loan defaulter file against its medical school loan defaulter file in order to determine the incidence of repeat defaulters, would not be covered, even though some of those in the data base might be Federal employees.

(h) **Background Investigation and Foreign Counter-intelligence Matches**. Matches done in the course of performing a background check for security clearances of Federal personnel or Federal contractor personnel are not covered. Nor are matches done for the purpose of foreign counter-intelligence.

b. **Recipient Agency**. Recipient agencies are Federal agencies (or their contractors) that receive records from the Privacy Act systems of records of other Federal agencies or from State and local governments to be used in matching programs.

Responsibilities: Recipient agencies are responsible for publishing matching notices in the Federal Register pursuant to the requirements of the Matching Act described below. Where a recipient agency is not the actual beneficiary of the matching program, it may negotiate with the actual beneficiary agency for reimbursement of the costs incurred in publishing. A recipient agency that is the beneficiary of the program should take the lead in performing a benefit-cost analysis and share that analysis with source agencies to help their Data Integrity Boards make a determination about providing data for the match. Recipient agencies are also responsible for making the matching program report to OMB and the Congress discussed below.

c. Source Agency. A source agency is a Federal agency that discloses records from a system of records to another Federal agency or to a State or local governmental agency to be used in a matching program. It is also a State or local governmental agency that discloses records to a Federal agency to be used in a matching program. The Computer Matching Act does not cover matching between non-Federal entities. A Federal source agency is required to have its own Data Integrity Board approve the agreement controlling the match; Non-Federal agencies are not required to have such boards. Source agencies are not responsible for publishing the notice of the match or reporting the match to OMB and Congress.

d. Non-Federal Agency. A non-Federal agency is a State or local governmental agency that receives records contained in a system of records from a Federal agency to be used in a matching program. State and local agencies are not responsible for publishing notices in the Federal Register or making reports to OMB and the Congress. Nor are they required to establish Data Integrity Boards to approve matching agreements. They should be prepared to provide to Federal source agencies data needed by those agencies to carry out their reporting and other responsibilities, e.g., benefit-cost analysis.

e. Federal Benefit Program. See paragraph 5a(1)(c) above.

6. Conducting Matching Programs: The following applies to Federal agencies. Requirements pertaining to non-Federal agencies are in paragraph 9 below.

Agencies undertaking matching programs covered by the Computer Matching Act will need to make sure that they comply with the following requirements:

a. Comply with Privacy Act Systems of Records and Disclosure Provisions: Federal agencies must ensure that they identify the systems of records involved in the matching programs and have published the necessary notices. Moreover, because the Matching Act does not itself authorize disclosures from systems of records for the purposes of conducting matching programs, agencies must justify any disclosures under section (b) of the Privacy Act. This means obtaining the written consent of the record subjects to the disclosure or relying on one of the 12 exceptions to the written consent rule. To rely on exception (b)(3), for a routine use, agencies must have published their intent to disclose in the Federal Register 30 days prior to any actual disclosure.

b. Give Prior Notice to Record Subjects. There are two ways in which record subjects can receive notice that their records may be matched:

- By direct notice when there is some form of contact between the government and the subject, e.g., information on the application form when they apply for a benefit or in a notice that arrives with a benefit that they receive;

- By constructive notice, e.g., publication of systems notices, routine use disclosures, and matching programs in the Federal Register.

For front-end eligibility verification programs whose purpose is to validate an applicant's initial eligibility for a benefit and later to determine continued eligibility, agencies should provide direct notice by amending the application form where necessary to enlarge the statement provided pursuant to Section (e)(3) of the Privacy Act so that applicants are put on notice that the information they provide may be verified through a computer match. Agencies should also provide periodic notice whenever the application is renewed, or at the least, during the period the match is authorized to take place, in a notice accompanying the benefit. Providers of services should be given notice on the form on which they apply for reimbursement for services provided.

In some cases, constructive notice may have to suffice. For example, a Federal agency that discloses records to a State or local government in support of a non-Federal matching program is not obligated to provide direct notice to each of the record subjects; Federal Register publication in this instance is sufficient. Moreover, in some instances, it may not be possible to provide direct notice -- in matches done to locate individuals, in emergency situations where health and safety reasons argue for a swift completion of the match; or in investigative matches where direct notice immediately prior to a match would provide the subject an opportunity to alter behavior.

In any case, notice to the record subject should be done well before a matching program commences. It should be part of the normal process of implementing a Federal benefits program.

c. Matching Notices - Publication Requirements. Agencies must publish notices of the establishment or alteration of matching programs in the Federal Register at least 30 days prior to conducting such programs. Only one notice is required and the recipient Federal agency in a match between Federal agencies or in a match in which a non-Federal agency discloses records to a Federal agency is responsible for publishing such notices. Where a State or local agency is the recipient of records from a Federal agency's system of records, the Federal source agency is responsible for publishing the notice. Such notices should contain the following information:

- Name of participating agency or agencies;
- Purpose of the match;
- Authority for conducting the matching program. (It should be noted that the Computer Matching Act provides no independent authority for carrying out any matching activity);

- Categories or records and individuals covered;
- Inclusive dates of the matching program;
- Address for receipt of public comments or inquiries.

Copies of proposed matching notices must accompany reports of proposed matches submitted pursuant to Section (r) of the Privacy Act as amended. See OMB Circular No. A-130, Appendix I, as amended.

d. Preparing and Executing Matching Agreements. Agencies should allow sufficient lead time to ensure that matching agreements can be negotiated and signed in time to secure Data Integrity Board decisions. Federal agencies receiving records from or disclosing records to non-Federal agencies for use in matching programs are responsible for preparing the matching agreements and should solicit relevant data from non-Federal agencies where necessary. In cases where matching takes place entirely within an agency under the Federal personnel or payroll matching provisions, the agency may satisfy the matching agreement requirements by preparing a Memorandum of Understanding between the system of records managers involved, and presenting that to the Data Integrity Board for consideration.

Agreements must contain the following:

- Purpose and Legal Authority. Since the Computer Matching Act provides no independent authority for the operation of matching programs, agencies should cite a specific Federal or State statutory or regulatory basis for undertaking such programs.

- Justification and Expected Results. An explanation of why computer matching as opposed to some other administrative activity is being proposed and what the expected results will be.

- Records Description. An identification of the system of records or non-Federal records, the number of records, and what data elements will be included in the match. Projected starting and completion dates for the program should also be provided. Agencies should specifically identify the Federal system or systems of records involved.

- Notice Procedures. A description of the individual and general periodic notice procedures. See paragraph 6.a., above.

- Verification Procedures. A description of the methods the agency will use to independently verify the information obtained through the matching program. See paragraph 6.f., below.

- Disposition of Matched Items. A statement that information generated through the match, will be destroyed as soon as it has served the matching program's purpose and any legal retention requirements the agency establishes in conjunction with the National Archives and Records Administration or other cognizant authority.

- **Security Procedures. A description of the administrative and technical safeguards to be used in protecting the information. They should be commensurate with the level of sensitivity of the data.**

- **Records Usage, Duplication and Redisclosure Restrictions**. A description of any specific restrictions imposed by either the source agency or by statute or regulation on collateral uses of the records used in the matching program. The agreement should specify how long a recipient agency may keep records provided for a matching program, and when they will be returned to the source agency or destroyed. In general, recipient agencies should not subsequently disclose records obtained for a matching program and under the terms of a matching agreement for other purposes absent a specific statutory requirement or where the disclosure is essential to the conduct of a matching program. The essential standard is a strict test that is more restrictive than the "compatibility" standard the Privacy Act establishes for disclosures made pursuant to section (b)(3): "for a routine use." Thus, under the essential standard, the results of the match may be disclosed for follow-up and verification or for civil or criminal law enforcement investigation or prosecution if the match uncovers activity that warrants such a result. This is not to say that agencies may never use the results of a matching program to make other eligibility determinations. For example, in the case of State/SSA COLA adjustment matches, States may use the results of this match to adjust payment levels for other benefits programs. If they do so, however, the subsequent uses must be included as part of the overall matching program as to the matching agreements, Federal Register notice, and the reporting requirements. Moreover, the Act's due process requirements will apply to the subsequent adjustments as well.

- Records Accuracy Assessments. Any information relating to the quality of the records to be used in the matching program. Record accuracy is important from two standpoints. In the first case, the worse the quality of the data, the less likely a matching program will have a cost-beneficial result. In the second case, the Privacy Act requires Federal agencies to maintain records they maintain in systems of records to a standard of accuracy that will reasonably assure fairness in any determination made on the basis of the record. Thus an agency receiving records from another Federal agency or from a non-Federal agency needs to know information about the accuracy of such records in order to comply with the law. Moreover, the Privacy Act also requires agencies to take reasonable steps to

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ensure the accuracy of records that are disclosed to non-Federal recipients.

- Comptroller General Access. A statement that the Comptroller General may have access to all records of a recipient agency or non-Federal agency necessary to monitor or verify compliance with the agreement. It should be understood that this requirement permits the Comptroller General to inspect State and local records used in matching programs covered by these agreements.

e. Securing Approval of Data Integrity Boards. Before an agency may participate in a matching program, the agency's Data Integrity Board must have evaluated the proposed match and approved the terms of the matching agreement. Agencies should ensure that boards consider matching proposals presented to them expeditiously so as not to cause bureaucratic delays to necessary programs. (See paragraph 7.d. below, for appeals of Board disapprovals).

f. Reports to OMB and Congress. See OMB Circular No. A-130, Appendix I as amended.

g. Providing Due Process to Matching Subjects. The Computer Matching Act prescribes certain due process requirements that the subjects of matching programs must be afforded when matches uncover adverse information about them.

- Verification of Adverse Information. Agencies may not premise adverse action upon the raw results of a computer match. Any adverse information so developed must be subjected to investigation and verification before action is taken. Federal benefits program matching as well as the matching of Federal employee records occurs across a wide spectrum of purposes and consequences. It would be of dubious utility to apply the verification requirements equally to all matches and argue that a match that results in an adverse consequence of the loss of, for example, a tuition assistance payment should receive the same due process procedures as one that results in the loss of an AFDC payment or Food Stamp Program eligibility. This is not to say that agencies can ignore or minimize these requirements for matches that result in less severe consequences; but only that they should bring some degree of reasonableness to the process of verifying data.

Conservation of agency resources dictates that the procedures for affording due process be flexible and suited to the data being verified and the consequence to the individual of making a mistake. In some cases, if the source agency has established a high degree of confidence in the quality of its data and it can demonstrate that its quality control processes are rigorous, the recipient agency may choose to expend fewer resources in independently verifying the data than otherwise. In such cases, it may be appropriate to combine the verification and notice requirements into a single step, especially if the record subject is the best source for verification. In certain circumstances, therefore, the verification and notice and wait steps can be combined into one. However, agencies should think through carefully when to use this compression and not consider it a routine process.

To ensure that this consideration takes place, it will be the responsibility of the Data Integrity Boards to make a formal determination as to when it is appropriate to compress the verification and notice and wait periods into a single period. OMB intends to collect these decisions as part of the reporting process.

In many cases, the individual record subject is the best source for determining a finding's validity, and he or she should be contacted where practicable. In other cases, the payer of a benefit will have the most accurate record relating to payment and should be contacted for verification. Note that, in some cases, contacting the subject initially may permit him or her to conceal data relevant to a decision; and, in those cases, an agency may elect to examine other sources. Absolute confirmation is not required; a reasonable verification process that yields confirmatory data will provide the agency with a reasonable basis for taking action.

As to applicants for Federal benefits programs whose eligibility is being verified through a matching program, agencies may not make a final determination until they have completed the due process steps the Act requires. This does not mean, however, that they are required to place an applicant on the rolls pending a determination, but only that they may not make a final decision.

For matching subjects receiving benefits, however, agencies may not suspend or reduce payments until the due process steps have been completed.

- Notice and Opportunity to Contest. Agencies are required to notify matching subjects of adverse information uncovered and give them an opportunity to explain prior to making a final determination. Again, this does not mean that an applicant must be put on the rolls pending his or her explanation, but only that the agency may not make a final determination. Current benefits recipients, however, may not have those benefits suspended or reduced pending the expiration of this period.

Individuals may have 30 days to respond to a notice of adverse action, unless a statute or regulation grants a longer period. The period runs from the date of the notice until 30 calendar days later, including transit time.

If an individual contacts the agency within the notice period and indicates his or her acceptance of the validity of the adverse information, agencies may take immediate action to deny or terminate. However, agencies are cautioned against attempting to coerce a record subject into accepting the result. Agencies may also take action if the period expires without contact.

If the Federal benefit program involved in the match has its own due process requirements, those requirements may suffice for the purposes of the Computer Matching Act, provided they are at least as strong as that Act's provisions.

In any case, if an agency determines that there is likely to be a potentially significant effect on public health or safety, it may take appropriate action, notwithstanding these due process provisions.

7. Establishing Data Integrity Boards: The Computer Matching Act requires that each Federal agency that acts as either a source or recipient in a matching program, establish a Data Integrity Board to oversee the agency's participation. Non-Federal governmental entities are not required to have such boards. It should be noted that the fact that records about an agency's personnel are used in a matching program does not automatically trigger this requirement. Because, for example, the Office of Personnel Management (OPM) asserts government-wide ownership of the system of records containing the Federal employee Official Personnel Folder (OPF), disclosures from this system of records involve OPM, not the employing agency. There are many small agencies that will never directly disclose records from their own systems of records for matching purposes and they are thus not required to establish Data Integrity Boards.

a. Location and Staffing. While the Act specifies neither the organizational level at which the Boards are to be established, nor their makeup (with two exceptions), it is clear from the context of the Data Integrity Board section that Congress expected agencies to place the Boards at the top of the organization and staff them with senior personnel. It is the intent of these guidelines not to dictate a specific structure but to suggest ways of complying with this expectation.

- Location. As to location, because the Boards are to serve a coordinating function, it would be inappropriate to locate them at other than the departmental level (or its agency equivalent). This is not to say that subordinate boards at component levels may not be useful to do the preliminary work necessary to provide a matching program proposal to the senior Board for approval. Indeed, in large agencies with many matching programs, this will likely be the rule. But, the approval should come from the top, and this argues for the placement suggested above.

- Staffing. The Act requires that the Board consist of senior agency officials designated by the agency head. The only two mandatory members are the Inspector General of the agency (if any) who may not serve as Chairman, and the senior official responsible for the implementation of the Privacy Act who has been designated pursuant to 44 U.S.C. 3506 (b). OMB recommends that the agency Privacy Act Officer be designated as the Board's Secretary.

- Operation. While much of the work of the Board may be delegated to less senior members -- for example, the compilation of reports, advising of program officials, and maintaining and disseminating information about the accuracy and reliability of data used in matching -- the approval of matching agreements may not be delegated.

The Board should meet often enough to ensure that agency matching programs are carried out efficiently, expeditiously and in conformance with the Privacy Act, as amended.

b. Review Responsibilities. Because matching agreements are key to the implementation of the Computer Matching Act, the Act makes their review the foremost responsibility of the Boards. Boards are responsible for approving or disapproving matching programs based upon their assessment of the adequacy of these agreements. They should ensure that their reasons for either approving or denying are well documented. Agency officials proposing matching programs should ensure that they provide the Data Integrity Board with all of the information relevant and necessary to permit it to make an informed decision, including, where appropriate, a benefit/cost analysis. Note that both the Federal source and recipient agencies must have the matching agreement ratified by their boards.

- Review of Proposals to Conduct or Participate in Matching Programs. The Board must review the matching agreements that support each proposed matching program and find them in conformance with the provisions of the Computer Matching Act as well as any other relevant statutes, regulations, or guidelines. Boards are specifically responsible for determining when to compress the due process steps of verification and notice and wait into a single step. A matching agreement should remain in force for only so long as necessary to accomplish the specific matching purpose; indeed, it automatically expires at the end of 18 months unless within 3 months prior to the actual expiration date, the Data Integrity Board finds that the program will be conducted without change and each party certifies that the program has been conducted in compliance with the matching agreement. Under this finding, the Board may extend the agreement for 1 additional year.

- Annual Review. The Act requires Data Integrity Boards to conduct an annual review of all matching programs in which the agency has participated as either a source or recipient agency. This review has two focuses: to determine whether the matches have been, or are being, conducted in accordance with the appropriate authorities and under the terms of the matching agreements; and, to assess the utility of the programs in terms of their costs and benefits. The Act suggests that this latter review as it pertains to recurring programs, should result in a basis for continuing participation in, or operation of, such programs. The Computer Matching Act also requires the Boards to review annually agency recordkeeping and disposal policies and practices for conformance with the Act's provisions. These reviews should take place within the context of the annual review referenced above. In addition, the Boards may review and report on matching activities not covered by the Computer Matching Act.

c. **Benefit/Cost Analysis**. The Computer Matching Act requires that a benefit/cost analysis be a part of an agency decision to conduct or participate in a matching program. The requirement occurs in two places: in matching agreements which must include a justification of the proposed match with a "specific estimate of any savings"; and, in the Data Integrity Board review process.

The intent of this requirement is not to create a presumption that when agencies balance individual rights and cost savings, the latter should inevitably prevail. Rather, it is to ensure that sound management practices are followed when agencies use records from Privacy Act systems of records in matching programs. Particularly in a time when competition for scarce resources is especially intense, it is not in the government's interests to engage in matching activities that drain agency resources that could be better spent elsewhere. Agencies should use the benefit/cost requirement as an opportunity to reexamine programs and weed out those that produce only marginal results.

While the Act appears to require a favorable benefit/cost ratio as an element of approval of a matching program, agencies should be cautious about applying this interpretation in too literal a fashion. For example, the first year in which a matching program is conducted may show a dramatic benefit/cost ratio. However, after it has been conducted on a regular basis, (with attendant publicity), its deterrent effect may result in much less favorable ratios. Elimination of such a program, however, may well result in a return to the prematch benefit/cost ratio. The agency should consider not only the actual savings attributable to such a program, but the consequences of abandoning it.

For proposed matches without an operational history, benefit/cost analyses will of necessity be speculative. While they should be based upon the best data available, reasonable estimates are acceptable at this stage. Nevertheless, agencies should design their programs so as to ensure the collection of data that will permit more accurate assessments to be made. As more and more data become available, it should be possible to make more informed assumptions about the benefits and costs of matching. One source of information about conducting benefit-cost analysis as it relates to matching programs is the GAO Report,- "Computer

Matching, Assesing its Costs and Benefits," GAO/PEMD-87-2, November, 1986. Agencies may wish to consult this report as they develop methodologies for performing this analysis.

Because matching is done for a variety of reasons, not all matching programs are appropriate candidates for benefit/cost analysis. The Computer Matching Act tacitly recognizes this point by permitting Data Integrity Boards to waive the benefit/cost requirement if they determine in writing that such an analysis is not required. It should be noted, however, that the Congress expected that such waivers would be used sparingly. The Act itself supplies one such waiver: if a match is specifically required by statute, the initial review by the Board need not consider the benefits and costs of the match. Note that this exclusion does not extend to matches undertaken at the discretion of the agency. However, the Act goes on to require that when the matching agreement is renegotiated, a benefit/cost analysis covering the preceding matches must be done. Note that the Act does not require the showing of a favorable ratio for the match to be continued, only that an analysis be done. The intention is to provide Congress with information to help it evaluate the effectiveness of statutory matching requirements with a view to revising or eliminating them where appropriate.

Other examples of matches in which the establishment of a favorable benefit/cost ratio would be inappropriate are:

- A match of a system of records containing information about nurses employed at VA hospitals with records maintained by State nurse licensing boards to identify VA nurses with "impaired licenses", i.e., those who have had some disciplinary action taken against them.

- A match whose purpose is to identify and correct erroneous data, e.g., Project Clean Data which was run to correct and eliminate erroneous Social Security Numbers.

- Selective Service System matching to identify 18 year-olds for draft registration purposes.

d. Appeals of Denials. If a Board disapproves a matching agreement, the Computer Matching Act permits any party to the agreement to appeal that disapproval to the Director of the Office of Management and Budget. While this literally means that a recipient agency (whether Federal or non-Federal) could appeal the refusal of a source agency to approve an agreement, the actual results of such cross agency appeals, even if successful, are unlikely to result in the implementation of a matching program since the source agency may still properly refuse to disclose the necessary Privacy Act records. Nothing in the appeal process is intended to result in one agency being able to force another agency to participate unwillingly in a matching program.

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Accordingly, OMB will only entertain appeals from senior agency officials who are parties to a proposed matching agreement that has been disapproved by the agency's own Data Integrity Board. By senior officials, OMB means the Inspector General of an agency or the head of an operating division carrying out the matching program.

The appeal should be forwarded to the Director, Office of Management and Budget, Washington, D.C. 20503 within 30 days following the Board's written disapproval. The following documentation should accompany the appeal:

- Copies of all of the documentation accompanying the initial matching agreement proposal;

- A copy of the Board's disapproval and reasons therefor;

- Evidence supporting the cost-effectiveness of the match;

- Any other information relevant to a decision, e.g., timing considerations, the public interest served by the match, etc.

The Director will promptly notify Congress of receipt of an appeal and of his or her decision. A decision to approve a matching agreement will not be effective until 30 days after it is so reported to Congress. The decision of the Director shall be based upon the information submitted.

OMB expects that this appeal process will be rarely used. One way to ensure its rarity is for agencies to present only well thoughtout and thoroughly documented proposals to the Boards for decisions.

e. Information Maintenance and Dissemination Responsibilities. The Act anticipates that the Data Integrity Boards will be an information resource on matching for the agency. Thus, while the full Board may actually convene only a few times each year to consider matching program proposals, the Act requires a continuing presence to carry out these additional functions. The Board, therefore, should designate a representative to answer questions on matching both from within the agency and from outside entities. This point of contact should be able to advise on what actions are needed to comply with the provisions of the Computer Matching Act, and to collect and disseminate information on the quality of the records used in matching programs.

8. General Reporting Requirements: The reporting requirements of the Data Integrity Boards will be contained in OMB Circular No. A-130, Appendix I. Matching reports are to be included in the general Privacy Act implementation reporting requirements

outlined in that Circular.

9. **Specific Responsibilities of Non-Federal Agencies**: It is not the intent of this Act to affect, nor do its provisions reach, State and local governments using their own records for matching purposes. Nor does the Act reach State or local matching programs using records from Federal systems of records for purposes other than those defined in the Act as for a "matching program."

Thus, for example, a Federal agency could disclose information about beneficiaries of a Federal program to a State agency in order to permit the State to conduct a matching program to determine eligibility for a State public assistance program. So long as the purpose was to validate eligibility for the State as opposed to the Federal benefit program, the Computer Matching Act would not come into play.

If however, the Federal agency disclosed the names and income levels of its own Federal employees to a State under these circumstances, the matching requirements would have to be met since this match would be covered under the "Federal employee personnel and payroll" provisions.

Non-Federal agencies intending to participate in covered matching programs are required to do the following:

- Execute matching agreements prepared by a Federal agency or agencies involved in the matching program;

- Provide data to Federal agencies on the costs and benefits of matching programs;

- Certify that they will not take adverse action against an individual as a result of any information developed in a matching program unless the information has been independently verified and until 30 days after the individual has been notified of the findings and given an opportunity to contest them.

- For renewals of matching programs, certify that the terms of the agreement have been followed.

10. **Sanctions**: The Computer Matching Act specifies that neither a Federal nor a non-Federal agency may disclose a record for use in a matching program if either has reason to believe the recipient is not meeting the terms of the matching agreement or the due process requirements of the Computer Matching Act. This provision does not create an affirmative duty on the part of a source agency to investigate a recipient agency's level of compliance. However, if a source agency receives information that would lead it to conclude that the recipient agency was not in compliance, it must consult with that agency before continuing to participate in the matching program.

Moreover, it should be noted that the civil remedies provisions of the Privacy Act are available to matching record subjects who can demonstrate that they have been harmed by an agency's violation of the Privacy Act or its own regulations. A successful litigant is entitled under the Privacy Act to receive at least $1,000 and reasonable attorney's fees. Given the large numbers of record subjects typically involved in a matching program, agencies should be especially diligent in guarding against actions that would create liabilities.

S. Jay Plager
Administrator
Office of Information and
Regulatory Affairs

Program Fraud Civil Remedies Act

Citations:

31 U.S.C. §§3801-12; enacted October 21,1986 by Pub. L. No. 99-509, §§6101-04, 100 Stat. 1934-1948.

Lead Agency:

None (general oversight by President's Council on Integrity and Efficiency and various agency Inspectors General).

Overview:

The Program Fraud Civil Remedies Act (PFCRA) establishes an administrative remedy against anyone who makes a false claim or written statement to any of the executive departments or agencies that have presidentially-appointed inspectors general. This remedy is available against any person who makes a claim or written statement to an agency that the person knows, or has reason to know, is false, fictitious, or fraudulent. It applies to claims for money, property or services from the government, or where the government, directly or by payment to a third party or state, supplies the money, property or services. It also applies to claims or statements that have the effect of reducing a debt that the claimant owes the United States. Such a person can be held liable for a penalty of up to $5000 per claim or statement. In addition, with respect to false claims, the person may be subject to an assessment of up to double the amount falsely claimed, if the claim was paid. These penalties and assessments may be imposed administratively, with appeal to United States district courts.

Congress indicated its desire that to the extent possible, uniform regulations be issued for all of the agencies to which the Act applies. A set of model regulations was drafted, and has been used by agencies as the basis for their rules.

Liability. Liability may be imposed on any person that files a false claim for property, services, money, grants, loans, insurance, or benefits that would be paid by a federal agency. The Act does not apply to payments of some social support benefits although it applies to applications for such benefits. §3803(c)(2)(C). The claim does not have to actually be paid for liability to attach. Liability may also be imposed for any false written statement, including representations, certifications, affirmations, documents, records, or accounting entries, which are made with respect to a claim, contract, bid or proposal for contract, grant, loan, or benefits, where the statement is accompanied by an "express certification or affirmation of the truthfulness and accuracy of the contents of the statement." §3802(a).

The Act also imposes liability for omissions where there is a duty to provide a fact with respect to a claim or statement, and the omission of such fact makes the claim or statement false, fictitious, or fraudulent. §§3802(a)(1)(C), (a)(2)(A)(ii). Liability may be imposed where the person "knows or has reason to know" that a claim or statement is false, fictitious, or fraudulent, or that a claim is for property or services that were not provided as claimed. "Knows or has reason to know" is defined as actually knowing the claim or statement is false, fictitious, or fraudulent, or acting in deliberate ignorance or reckless disregard of the truth or falsity of the statement or claim. §3801(a)(5).

An exemption from liability exists for beneficiaries of certain social welfare and grant programs, unless the false claim or statement relates to eligibility to receive the particular benefits. §§3803(c)(2).

Penalties are up to $5000 per claim or statement, with an additional assessment possible for false claims that have been paid of up to twice the amount falsely claimed. The definition of claim includes "any request, demand or submission" for money, property, or services. §3801(a)(3).

Administrative actions may not be taken under PFCRA with respect to any claim or "group of related claims submitted at the same time" for which the amount falsely claimed exceeds

$150,000. Such cases would be actionable in U.S. district court to the civil False Claims Act, 31 U.S.C. §3729 (1988).

The United States Supreme Court, in *U.S. v. Halper*, 490 U.S. 435 (1989), held that certain civil penalties imposed following federal criminal convictions for the same conduct, may constitute double jeopardy. Although that case involved penalties under the civil False Claims Act, its reasoning would apply in PFCRA cases as well.

Administrative Procedures. The Act establishes a fairly complex set of administrative procedures in addition to provisions governing the formal hearings. Investigative responsibility is assigned to the agency's inspector general; if the IG concludes that action under the Act is warranted, a report of the investigation is submitted to a "reviewing official." If the reviewing official, who is often the General Counsel or a designee, determines that there is "adequate evidence" to believe that liability exists, he or she sends a written notice of intent to issue a complaint to the Department of Justice. The Department of Justice has 90 days to approve or disapprove the issuance of a complaint. If approval is granted, a complaint may be issued. The defendant is entitled to a hearing that is consistent with the Administrative Procedure Act, although the Act contains some additional provisions, including the express authority for permitting discovery that the presiding officer (usually an administrative law judge) determines is "necessary for the expeditious, fair and reasonable consideration of the issues." §3803(g)(3)(B)(ii). Where the APA does not apply to a particular agency, the Act requires the agency to promulgate procedures similar to the APA.

A decision by the presiding officer is reviewable by the agency head on request of the defendant. Judicial review is available in the United States district courts, under a "substantial evidence" test.

Model rules for implementing PFCRA were drafted by representatives from several different agencies under the aegis of the President's Council on Integrity and Efficiency. The Department of Health and Human Services served as lead in this effort, based on its experience under a similar administrative anti-fraud civil money penalty program. The model rules were circulated to all covered agencies, and each agency is responsible for promulgating its own rules based on the model. In the Appendix, DHHS' final rule appears, as an example of model rules as adopted by an agency. A list of the rules promulgated by other agencies appears below.

Legislative History:

Legislation to provide an administrative remedy for fraud against federal agencies was the result of efforts over several years. Initially proposed in response to reports of fraud in programs such as Medicare, mortgage insurance, and agricultural subsidies, the legislation passed at a time when procurement fraud was a particularly visible issue. Bills were introduced in several Congresses before PFCRA was enacted as part of the Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509.

Source Note:

The Conference has advocated the use of administrative civil monetary penalties in several of its recommendations. See Conference Recommendations 72-6 and 79-3. The reports on which these recommendations were based are published in the Conference Recommendations and Reports volumes for 1972 and 1979.

The report of the Senate Committee on Governmental Affairs that accompanied the Senate bill, S. 1134, is the most complete discussion of the legislation. See S. Rep. 212, 99th Cong., 1st Sess. (1985).

Relatively few articles have been written about PFCRA that do much more than describe its provisions.

Bibliography:

I. Legislative History

1. Floor debate on motion to strike PFCRA from Omnibus Budget Reconciliation Act of 1986, 132 Cong. Rec. S. 13005 (daily ed. September 19, 1986) (statement of Sen. Cohen).

2. *Hearings before Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary on False Claims Act Amendments*, Committee Serial No. 48, 99th Cong., 2d Sess. (February 5-6, 1986).

3. House of Representatives Committee on Judiciary, *False Claims Amendments of 1986*, H. Rep. 99-660, 99th Cong., 2d Sess. (June 26, 1986).

4. H.R. Conf. Rep. 99-1012, 99th Cong., 2d Sess. (1986) at 257, *reprinted in* 1986 U.S. Code Cong. & Admin. News 3902.

5. *Program Fraud Civil Penalties Act of 1985: Hearings before the Subcommittee on Oversight of Government Management of the Senate Governmental Affairs Committee (Concerning S.1134)*, 99th Cong., 1st Sess. (June 18, 1985).

6. Senate Committee on Governmental Affairs, *Report to Accompany S. 1134, The Program Fraud Civil Remedies Act of 1985*, S. Rep. 99-212, 99th Cong., 1st Sess. (December 10, 1985).

II. Other Government Documents

1. Administrative Conference of the United States, Recommendation 72-6, *Civil Money Penalties as a Sanction*, 1 CFR §305.72-6 (1992).

2. Administrative Conference of the United States, Recommendation 79-3, *Agency Assessment and Mitigation of Civil Money Penalties*, 1 CFR §305.79-3 (1992).

3. Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, Report to the Administrative Conference of the U.S., 1979 ACUS 203, *reprinted in abridged form* 79 Colum. L. Rev. 1435 (1979).

4. Goldschmid, *An Evaluation of the Present and Potential Use of Civil Money Penalties as a Sanction by Federal Administrative Agencies*, Report to the Administrative Conference of the U.S., 1973 ACUS 896.

III. Books and Articles

1. Brown & Boyd, *The Program Fraud Civil Remedies Act: The Administrative Adjudication of Fraud Against the Government*, 50 Fed. Cont. Rep. (BNA) 691 (1988).

2. Pompeo, *The Jury's Out--A Seventh Amendment Challenge to the Program Fraud Civil Remedies Act*, 12 Geo. Mason L. Rev. 207 (1990).

Agency Regulations:

Agency for International Development	22 CFR Part 224
Agriculture	7 CFR Part 1
Defense	32 CFR Part 277
Education	34 CFR Part 33
Energy	10 CFR Part 1013
Environmental Protection Agency	40 CFR Part 27
General Services Administration	41 CFR Part 105-70
Health and Human Services	45 CFR Part 79
Housing and Urban Development	24 CFR Part 28
Interior	43 CFR Part 35
Justice	28 CFR Part 71
Labor	29 CFR Part 22
National Aeronautics and Space Administration	14 CFR Part 1264
Nuclear Regulatory Commission	10 CFR Part 13
Postal Service (administration)	39 CFR Part 273
Postal Service (practice rules in proceedings relative to)	39 CFR Part 962
Railroad Retirement Board	20 CFR Part 355
Small Business Administration	13 CFR Part 142
Transportation	49 CFR Part 31
Treasury	31 CFR Part 16
United States Information Agency	22 CFR Part 521
Veterans Affairs	38 CFR Part 42

Appendix:

1. Program Fraud Civil Remedies Act, 31 U.S.C. §§3801-12 (1988).
2. Department of Health and Human Services, Program Fraud Civil Remedies, 45 CFR Part 79 (1991).

Program Fraud Civil Remedies Act

Title 31, U.S. Code

Chapter 38-Administrative Remedies for False Claims and Statements

§3801. Definitions.
§3802. False claims and statements; liability.
§3803. Hearing and determinations.
§3804. Subpoena authority.
§3805. Judicial review.
§3806. Collection of civil penalties and assessments.
§3807. Right to administrative offset.
§3808. Limitations.
§3809. Regulations.
§3810. Reports.
§3811. Effect on other law.
§3812. Prohibition against delegation.

§3801. Definitions

(a) For purposes of this chapter-

(1) "authority" means-

(A) an executive department;

(B) a military department;

(C) an establishment (as such term is defined in section 11(2) of the Inspector General Act of 1978) which is not an executive department; and

(D) the United States Postal Service;

(2) "authority head" means-

(A) the head of an authority; or

(B) an official or employee of the authority designated, in regulations promulgated by the head of the authority, to act on behalf of the head of the authority;

(3) "claim" means any request, demand, or submission-

(A) made to an authority for property, services, or money (including money representing grants, loans, insurance, or benefits);

(B) made to a recipient of property, services, or money from an authority or to a party to a contract with an authority-

(i) for property or services if the United States-

(I) provided such property or services;

(II) provided any portion of the funds for the purchase of such property or services; or

(III) will reimburse such recipient or party for the purchase of such property or services; or

(ii) for the payment of money (including money representing grants, loans, insurance, or benefits) if the United States-

(I) provided any portion of the money requested or demanded; or

(II) will reimburse such recipient or party for any portion of the money paid on such request or demand; or

(C) made to an authority which has the effect of decreasing an obligation to pay or account for property, services, or money,

except that such term does not include any claim made in any return of tax imposed by the Internal Revenue Code of 1986;

(4) "investigating official" means an individual who-

(A)(i) in the case of an authority in which an Office of Inspector General is established by the Inspector General Act of 1978 or by any other Federal law, is the Inspector General of that authority or an officer or employee of such Office designated by the Inspector General;

(ii) in the case of an authority in which an Office of Inspector General is not established by the Inspector General Act of 1978 or by any other Federal law, is an officer or employee of the authority designated by the authority head to conduct investigations under section 3803(a)(1) of this title; or

(iii) in the case of a military department, is the Inspector General of the Department of Defense or an officer or employee of the Office of Inspector General of the Department of Defense who is designated by the Inspector General; and

(B) who, if a member of the Armed Forces of the United States on active duty, is serving in grade O-7 or above or, if a civilian employee, is serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for grade GS-16 under the General Schedule;

(5) "knows or has reason to know", for purposes of establishing liability under section 3802, means that a person, with respect to a claim or statement-

(A) has actual knowledge that the claim or statement is false, fictitious, or fraudulent;

(B) acts in deliberate ignorance of the truth or falsity of the claim or statement; or

(C) acts in reckless disregard of the truth or falsity of the claim or statement, and no proof of specific intent to defraud is required;

(6) "person" means any individual, partnership, corporation, association, or private organization;

(7) "presiding officer" means-

(A) in the case of an authority to which the provisions of subchapter II of chapter 5 of title 5 apply, an administrative law judge appointed in the authority pursuant to section 3105 of such title or detailed to the authority pursuant to section 3344 of such title; or

(B) in the case of an authority to which the provisions of such subchapter do not apply, an officer or employee of the authority who-

(i) is selected under chapter 33 of title 5 pursuant to the competitive examination process applicable to administrative law judges;

(ii) is appointed by the authority head to conduct hearings under section 3803 of such[1] title;

(iii) is assigned to cases in rotation so far as practicable;

(iv) may not perform duties inconsistent with the duties and responsibilities of a presiding officer;

(v) is entitled to pay prescribed by the Office of Personnel Management independently of ratings and recommendations made by the authority and in accordance with chapter 51 of such title and subchapter III of chapter 53 of such title;

(vi) is not subject to performance appraisal pursuant to chapter 43 of such title; and

(vii) may be removed, suspended, furloughed, or reduced in grade or pay only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing by such Board;

(8) "reviewing official" means any officer or employee of an authority-

(A) who is designated by the authority head to make the determination required under section 3803(a)(2) of this title;

(B) who, if a member of the Armed Forces of the United States on active duty, is serving in grade O-7 or above or, if a civilian employee, is serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for grade GS-16 under the General Schedule; and

(C) who is-

(i) not subject to supervision by, or required to report to, the investigating official; and

(ii) not employed in the organizational unit of the authority in which the investigating official is employed; and

(9) "statement" means any representation, certification, affirmation, document, record, or accounting or bookkeeping entry made-

(A) with respect to a claim or to obtain the approval or payment of a claim (including relating to eligibility to make a claim); or

(B) with respect to (including relating to eligibility for)-

(i) a contract with, or a bid or proposal for a contract with; or

(ii) a grant, loan, or benefit from,

an authority, or any State, political subdivision of a State, or other party, if the United States Government provides any portion of the money or property under such contract or for such grant, loan, or benefit, or if the Government will reimburse such State, political subdivision, or party for any portion of the money or property under such contract or for such grant, loan, or benefit, except that such term does not include any statement made in any return of tax imposed by the Internal Revenue Code of 1986.

(b) For purposes of paragraph (3) of subsection (a)-

(1) each voucher, invoice, claim form, or other individual request or demand for property, services, or money constitutes a separate claim;

(2) each claim for property, services, or money is subject to this chapter regardless of whether such property, services, or money is actually delivered or paid; and

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[1] So in original. Probably should be "this".

(3) a claim shall be considered made, presented, or submitted to an authority, recipient, or party when such claim is actually made to an agent, fiscal intermediary, or other entity, including any State or political subdivision thereof, acting for or on behalf of such authority, recipient, or party.

(c) For purposes of paragraph (9) of subsection (a)-

(1) each written representation, certification, or affirmation constitutes a separate statement; and

(2) a statement shall be considered made, presented, or submitted to an authority when such statement is actually made to an agent, fiscal intermediary, or other entity, including any State or political subdivision thereof, acting for or on behalf of such authority.

(Added Pub. L. No. 99-509, title VI, §6103(a), Oct. 21, 1986, 100 Stat. 1934, and amended Pub. L. No. 99-514, §2, Oct. 22, 1986, 100 Stat. 2095.)

Congressional Findings and Purposes

Section 6102 of subtitle B (§§6101-6104) of title VI of Pub. L. No. 99-509 provided that:

"(a) Findings.-The Congress finds that--

"(1) false, fictitious, and fraudulent claims and statements in Government programs are a serious problem;

"(2) false, fictitious, and fraudulent claims and statements in Government programs result in the loss of millions of dollars annually by allowing persons to receive Federal funds to which they are not entitled;

"(3) false, fictitious, and fraudulent claims and statements in Government programs undermine the integrity of such programs by allowing ineligible persons to participate in such programs; and

"(4) present civil and criminal remedies for such claims and statements are not sufficiently responsive.

"(b) Purposes.-The purposes of this subtitle are--

"(1) to provide Federal agencies which are the victims of false, fictitious, and fraudulent claims and statements with an administrative remedy to recompense such agencies for losses resulting from such claims and statements, to permit administrative proceedings to be brought against persons who make, present, or submit such claims and statements, and to deter the making, presenting, and submitting of such claims and statements in the future; and

"(2) to provide due process protections to all persons who are subject to the administrative adjudication of false, fictitious, or fraudulent claims or statements."

§3802. False claims and statements; liability

(a)(1) Any person who makes, presents, or submits, or causes to be made, presented, or submitted, a claim that the person knows or has reason to know-

(A) is false, fictitious, or fraudulent;

(B) includes or is supported by any written statement which asserts a material fact which is false, fictitious, or fraudulent;

(C) includes or is supported by any written statement that-

(i) omits a material fact;

(ii) is false, fictitious, or fraudulent as a result of such omission; and

(iii) is a statement in which the person making, presenting, or submitting such statement has a duty to include such material fact; or

(D) is for payment for the provision of property or services which the person has not provided as claimed,

shall be subject to, in addition to any other remedy that may be prescribed by law, a civil penalty of not more than $5,000 for each such claim. Except as provided in paragraph (3) of this subsection, such person shall also be subject to an assessment, in lieu of damages sustained by the United States because of such claim, of not more than twice the amount of such claim, or the portion of such claim, which is determined under this chapter to be in violation of the preceding sentence.

(2) Any person who makes, presents, or submits, or causes to be made, presented, or submitted, a written statement that-

(A) the person knows or has reason to know-

(i) asserts a material fact which is false, fictitious, or fraudulent; or

(ii)(I) omits a material fact; and

(II) is false, fictitious, or fraudulent as a result of such omission;

(B) in the case of a statement described in clause (ii) of subparagraph (A), is a statement in which the person making, presenting, or submitting such statement has a duty to include such material fact; and

(C) contains or is accompanied by an express certification or affirmation of the truthfulness and accuracy of the contents of the statement,

shall be subject to, in addition to any other remedy that may be prescribed by law, a civil penalty of not more than $5,000 for each such statement.

(3) An assessment shall not be made under the second sentence of paragraph (1) with respect to a claim if payment by the Government has not been made on such claim.

(b)(1) Except as provided in paragraphs (2) and (3) of this subsection-

(A) a determination under section 3803(a)(2) of this title that there is adequate evidence to believe that a person is liable under subsection (a) of this section; or

(B) a determination under section 3803 of this title that a person is liable under subsection (a) of this section,

may provide the authority with grounds for commencing any administrative or contractual action against such person which is authorized by law and which is in addition to any action against such person under this chapter.

(2) A determination referred to in paragraph (1) of this subsection may be used by the authority, but shall not require such authority, to commence any administrative or contractual action which is authorized by law.

(3) In the case of an administrative or contractual action to suspend or debar any person who is eligible to enter into contracts with the Federal Government, a determination referred to in paragraph (1) of this subsection shall not be considered as a conclusive determination of such person's responsibility pursuant to Federal procurement laws and regulations.

(Added Pub. L. No. 99-509, title VI, §6103(a), Oct. 21, 1986, 100 Stat. 1937.)

§3803. Hearing and determinations

(a)(1) The investigating official of an authority may investigate allegations that a person is liable under section 3802 of this title and shall report the findings and conclusions of such investigation to the reviewing official of the authority. The preceding sentence does not modify any responsibility of an investigating official to report violations of criminal law to the Attorney General.

(2) If the reviewing official of an authority determines, based upon the report of the investigating official under paragraph (1) of this subsection, that there is adequate evidence to believe that a person is liable under section 3802 of this title, the reviewing official shall transmit to the Attorney General a written notice of the intention of such official to refer the allegations of such liability to a presiding officer of such authority. Such notice shall include-

(A) a statement of the reasons of the reviewing official for the referral of such allegations;

(B) a statement specifying the evidence which supports such allegations;

(C) a description of the claims or statements for which liability under section 3802 of this title is alleged;

(D) an estimate of the amount of money or the value of property or services requested or demanded in violation of section 3802 of this title; and

(E) a statement of any exculpatory or mitigating circumstances which may relate to such claims or statements.

(b)(1) Within 90 days after receipt of a notice from a reviewing official under paragraph (2) of subsection (a), the Attorney General or an Assistant Attorney General designated by the Attorney General shall transmit a written statement to the reviewing official which specifies-

(A) that the Attorney General or such Assistant Attorney General approves or disapproves the referral to a presiding officer of the allegations of liability stated in such notice;

(B) in any case in which the referral of allegations is approved, that the initiation of a proceeding under this section with respect to such allegations is appropriate; and

(C) in any case in which the referral of allegations is disapproved, the reasons for such disapproval.

(2) A reviewing official may refer allegations of liability to a presiding officer only if the Attorney General or an Assistant Attorney General designated by the Attorney General approves the referral of such allegations in a written statement described in paragraph (1) of this subsection.

(3) If the Attorney General or an Assistant Attorney General designated by the Attorney General transmits to an authority head a written finding that the continuation of any hearing under this section with respect to a claim or statement may adversely affect any pending or potential criminal or civil action related to such claim or statement, such hearing shall be immediately stayed and may be resumed only upon written authorization of the Attorney General.

(c)(1) No allegations of liability under section 3802 of this title with respect to any claim made, presented, or submitted by any person shall be referred to a presiding officer under paragraph (2) of subsection (b) if the reviewing official determines that-

(A) an amount of money in excess of $150,000; or

(B) property or services with a value in excess of $150,000,

is requested or demanded in violation of section 3802 of this title in such claim or in a group of related claims which are submitted at the time such claim is submitted.

(2)(A) Except as provided in subparagraph (B) of this paragraph, no allegations of liability against an individual under section 3802 of this title with respect to any claim or statement made, presented, or submitted, or caused to be made, presented, or submitted, by such individual relating to any benefits received by such individual shall be referred to a presiding officer under paragraph (2) of subsection (b).

(B) Allegations of liability against an individual under section 3802 of this title with respect to any claim or statement made, presented, or submitted, or caused to be made, presented, or submitted, by such individual relating to any benefits received by such individual may be referred to a presiding officer under paragraph (2) of subsection (b) if-

(i) such claim or statement is made by such individual in making application for such benefits;

(ii) such allegations relate to the eligibility of such individual to receive such benefits; and

(iii) with respect to such claim or statement, the individual-

(I) has actual knowledge that the claim or statement is false, fictitious, or fraudulent;

(II) acts in deliberate ignorance of the truth or falsity of the claim or statement; or

(III) acts in reckless disregard of the truth or falsity of the claim or statement.

(C) For purposes of this subsection, the term "benefits" means-

(i) benefits under the supplemental security income program under title XVI of the Social Security Act;

(ii) old age, survivors, and disability insurance benefits under title II of the Social Security Act;

(iii) benefits under title XVIII of the Social Security Act;

(iv) aid to families with dependent children under a State plan approved under section 402(a) of the Social Security Act;

(v) medical assistance under a State plan approved under section 1902(a) of the Social Security Act;

(vi) benefits under title XX of the Social Security Act;

(vii) benefits under the food stamp program (as defined in section 3(h) of the Food Stamp Act of 1977);

(viii) benefits under chapters 11, 13, 15, 17, and 21 of title 38;

(ix) benefits under the Black Lung Benefits Act;

(x) benefits under the special supplemental food program for women, infants, and children established under section 17 of the Child Nutrition Act of 1966;

(xi) benefits under section 336 of the Older Americans Act;

(xii) any annuity or other benefit under the Railroad Retirement Act of 1974;

(xiii) benefits under the National School Lunch Act;

(xiv) benefits under any housing assistance program for lower income families or elderly or handicapped persons which is administered by the Secretary of Housing and Urban Development or the Secretary of Agriculture;

(xv) benefits under the Low-Income Home Energy Assistance Act of 1981; and

(xvi) benefits under part A of the Energy Conservation in Existing Buildings Act of 1976,

which are intended for the personal use of the individual who receives the benefits or for a member of the individual's family.

(d)(1) On or after the date on which a reviewing official is permitted to refer allegations of liability to a presiding officer under subsection (b) of this section, the reviewing official shall mail, by registered or certified mail, or shall deliver, a notice to the person alleged to be liable under section 3802 of this title. Such notice shall specify the allegations of liability against such person and shall state the right of such person to request a hearing with respect to such allegations.

(2) If, within 30 days after receiving a notice under paragraph (1) of this subsection, the person receiving such notice requests a hearing with respect to the allegations contained in such notice-

(A) the reviewing official shall refer such allegations to a presiding officer for the commencement of such hearing; and

(B) the presiding officer shall commence such hearing by mailing by registered or certified mail, or by delivery of, a notice which complies with paragraphs (2)(A) and (3)(B)(i) of subsection (g) to such person.

(e)(1)(A) Except as provided in subparagraph (B) of this paragraph, at any time after receiving a notice under paragraph (2)(B) of subsection (d), the person receiving such notice shall be entitled to review, and upon payment of a reasonable fee for duplication, shall be entitled to obtain a copy of, all relevant and material documents, transcripts, records, and other materials, which relate to such allegations and upon which the findings and conclusions of the investigating official under paragraph (1) of subsection (a) are based.

(B) A person is not entitled under subparagraph (A) to review and obtain a copy of any document, transcript, record, or material which is privileged under Federal law.

(2) At any time after receiving a notice under paragraph (2)(B) of subsection (d), the person receiving such notice shall be entitled to obtain all exculpatory information in the possession of the investigating official or the reviewing official relating to the allegations contained in such notice. The provisions of subparagraph (B) of paragraph (1) do not apply to any document, transcript, record, or other material, or any portion thereof, in which such exculpatory information is contained.

(f) Any hearing commenced under paragraph (2) of subsection (d) shall be conducted by the presiding officer on the record in order to determine-

(1) the liability of a person under section 3802 of this title; and

(2) if a person is determined to be liable under such section, the amount of any civil penalty or assessment to be imposed on such person.

Any such determination shall be based on the preponderance of the evidence.

(g)(1) Each hearing under subsection (f) of this section shall be conducted-

(A) in the case of an authority to which the provisions of subchapter II of chapter 5 of title 5 apply, in accordance with-

(i) the provisions of such subchapter to the extent that such provisions are not inconsistent with the provisions of this chapter; and

(ii) procedures promulgated by the authority head under paragraph (3) of this subsection; or

(B) in the case of an authority to which the provisions of such subchapter do not apply, in accordance with procedures promulgated by the authority head under paragraphs (2) and (3) of this subsection.

(2) An authority head of an authority described in subparagraph (B) of paragraph (1) shall by regulation promulgate procedures for the conduct of hearings under this chapter. Such procedures shall include:

(A) The provision of written notice of the hearing to any person alleged to be liable under section 3802 of this title, including written notice of-

(i) the time, place, and nature of the hearing;

(ii) the legal authority and jurisdiction under which the hearing is to be held; and

(iii) the matters of facts and law to be asserted.

(B) The provision to any person alleged to be liable under section 3802 of this title of opportunities for the submission of facts, arguments, offers of settlement, or proposals of adjustment.

(C) Procedures to ensure that the presiding officer shall not, except to the extent required for the disposition of ex parte matters as authorized by law-

(i) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to the hearing to participate; or

(ii) be responsible to or subject to the supervision or direction of the investigating official or the reviewing official.

(D) Procedures to ensure that the investigating official and the reviewing official do not participate or advise in the decision required under subsection (h) of this section or the review of the decision by the authority head under subsection (i) of this section, except as provided in subsection (j) of this section.

(E) The provision to any person alleged to be liable under section 3802 of this title of opportunities to present such person's case through oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

(F) Procedures to permit any person alleged to be liable under section 3802 of this title to be accompanied, represented, and advised by counsel or such other qualified representative as the authority head may specify in such regulations.

(G) Procedures to ensure that the hearing is conducted in an impartial manner, including procedures to-

(i) permit the presiding officer to at any time disqualify himself; and

(ii) permit the filing, in good faith, of a timely and sufficient affidavit alleging personal bias or another reason for disqualification of a presiding officer or a reviewing official.

(3)(A) Each authority head shall promulgate by regulation procedures described in subparagraph (B) of this paragraph for the conduct of hearings under this chapter. Such procedures shall be in addition to the procedures described in paragraph (1) or paragraph (2) of this subsection, as the case may be.

(B) The procedures referred to in subparagraph (A) of this paragraph are:

(i) Procedures for the inclusion, in any written notice of a hearing under this section to any person alleged to be liable under section 3802 of this title, of a description of the procedures for the conduct of the hearing.

(ii) Procedures to permit discovery by any person alleged to be liable under section 3802 of this title only to the extent that the presiding officer determines that such discovery is necessary for the expeditious, fair, and reasonable consideration of the issues, except that such procedures shall not apply to documents, transcripts, records, or other material which a person is entitled to review under paragraph (1) of subsection (e) or to information to which a person is entitled under paragraph (2) of such subsection. Procedures promulgated under this clause shall prohibit the discovery of the notice required under subsection (a)(2) of this section.

(4) Each hearing under subsection (f) of this section shall be held-

(A) in the judicial district of the United States in which the person alleged to be liable under section 3802 of this title resides or transacts business;

(B) in the judicial district of the United States in which the claim or statement upon which the allegation of liability under such section was made, presented, or submitted; or

(C) in such other place as may be agreed upon by such person and the presiding officer who will conduct such hearing.

(h) The presiding officer shall issue a written decision, including findings and determinations, after the conclusion of the hearing. Such decision shall include the findings of fact and conclusions of law which the presiding officer relied upon in determining whether a person is liable under this chapter. The presiding officer shall promptly send to each party to the hearing a copy of such decision and a statement describing the right of any person determined to be liable under section 3802 of this title to appeal the decision of the presiding officer to the authority head under paragraph (2) of subsection (i).

(i)(1) Except as provided in paragraph (2) of this subsection and section 3805 of this title, the decision, including the findings and determinations, of the presiding officer issued under subsection (h) of this section are final.

(2)(A)(i) Except as provided in clause (ii) of this subparagraph, within 30 days after the presiding officer issues a decision under subsection (h) of this section, any person determined in such decision to be liable under section 3802 of this title may appeal such decision to the authority head.

(ii) If, within the 30-day period described in clause (i) of this subparagraph, a person determined to be liable under this chapter requests the authority head for an extension of such 30-day period to file an appeal of a decision issued by the presiding officer under subsection (h) of this section, the authority head may extend such period if such person demonstrates good cause for such extension.

(B) Any authority head reviewing under this section the decision, findings, and determinations of a presiding officer shall not consider any objection that was not raised in the hearing conducted pursuant to subsection (f) of this section unless a demonstration is made of extraordinary circumstances causing the failure to raise the objection. If any party demonstrates to the satisfaction of the authority head that additional evidence not presented at such hearing is material and that there were reasonable grounds for the failure to present such evidence at such hearing, the authority head shall remand the matter to the presiding officer for consideration of such additional evidence.

(C) The authority head may affirm, reduce, reverse, compromise, remand, or settle any penalty or assessment determined by the presiding officer pursuant to this section. The authority head shall promptly send to each party to the appeal a copy of the decision of the authority head and a statement describing the right of any person determined to be liable under section 3802 of this title to judicial review under section 3805 of this title.

(j) The reviewing official has the exclusive authority to compromise or settle any allegations of liability under section 3802 of this title against a person without the consent of the presiding officer at any time after the date on which the reviewing official is permitted to refer allegations of liability to a presiding officer under subsection (b) of this section and prior to the date on which the presiding officer issues a decision under subsection (h) of this section. Any such compromise or settlement shall be in writing.

(Added Pub. L. No. 99-509, title VI, §6103(a), Oct. 21, 1986, 100 Stat. 1939.)

REFERENCES IN TEXT

The Social Security Act, referred to in subsec. (c)(2)(C)(i) to (vi), is act Aug. 14, 1935, ch. 531, 49 Stat. 620, as amended. Titles II, XVI, XVIII, and XX of the Social Security Act are classified generally to subchapters II (§401 et seq.), XVI (§1381 et seq.), XVIII (§1395 et seq.), and XX (§1397 et seq.), respectively, of chapter 7 of Title 42, The Public Health and Welfare. Sections 402(a) and 1902(a) of such Act are classified to sections 602(a) and 1396a(a), respectively, of Title 42. For complete classification of this Actto the Code, see section 1305 of Title 42 and Tables.

Section 3(h) of the Food Stamp Act of 1977, referred to in subsec. (c)(2)(C)(vii), is classified to section 2012(h) of Title 7, Agriculture.

The Black Lung Benefits Act, referred to in subsec. (c)(2)(C)(ix), is title IV of Pub. L. No. 91-173, Dec. 30, 1969, 83 Stat. 792, as amended, which is classified generally to subchapter IV (§901 et seq.) of chapter 22 of Title 30, Mineral Lands and Mining. For complete classification of this Act to the Code, see section 901(b) of Title 30 and Tables.

Section 17 of the Child Nutrition Act of 1966, referred to in subsec. (c)(2)(C)(x), is classified to section 1786 of Title 42, The Public Health and Welfare.

Section 336 of the Older Americans Act, referred to in subsec. (c)(2)(C)(xi), probably means section 336 of the Older Americans Act of 1965, which is classified to section 3030f of Title 42.

The Railroad Retirement Act of 1974, referred to in subsec. (c)(2)(C)(xii), is title I of Pub. L. No. 93-444, Oct. 16, 1974, 88 Stat. 1305, as amended, which is classified generally to subchapter IV (§231 et seq.) of chapter 9 of Title 45, Railroads. For complete classification of this Act to the Code, see section 231t of Title 45 and Tables.

The National School Lunch Act, referred to in subsec. (c)(2)(C)(xiii), is act June 4, 1946, ch. 281, 60 Stat. 230, as amended, which is classified generally to chapter 13 (§1751 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 1751 of Title 42 and Tables.

The Low-Income Home Energy Assistance Act of 1981, referred to in subsec. (c)(2)(C)(xv), is title XXVI of Pub. L. No. 97-35, Aug. 13, 1981, 95 Stat. 893, as amended, which is classified generally to subchapter II (§8621 et seq.) of chapter 94 of Title 42. For complete classification of this Act to the Code,see Short Title note set out under section 8621 of Title 42 and Tables.

The Energy Conservation in Existing Buildings Act of 1976, referred to in subsec. (c)(2)(C)(xvi), is title IV of Pub. L. No. 94-385, Aug. 14, 1976, 90 Stat. 1150, as amended. Part A of the Energy Conservation in Existing Buildings Act of 1976 is classified generally to Part A (§6861 et seq.) of subchapter III of chapter 81 of Title 42. For complete classification of this Act to theCode, see Short Title note set out under section 6801 of Title 42 and Tables.

§3804. Subpoena authority

(a) For the purposes of an investigation under section 3803(a)(1) of this title, an investigating official is authorized to require by subpoena the production of all information, documents, reports, answers, records, accounts, papers, and data not otherwise reasonably available to the authority.

(b) For the purposes of conducting a hearing under section 3803(f) of this title, a presiding officer is authorized-

(1) to administer oaths or affirmations; and

(2) to require by subpoena the attendance and testimony of witnesses and the production of all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence which the presiding officer considers relevant and material to the hearing.

(c) In the case of contumacy or refusal to obey a subpoena issued pursuant to subsection (a) or (b) of this section, the district courts of the United States shall have jurisdiction to issue an appropriate order for the enforcement of any such subpoena. Any failure to obey such order of the court is punishable by such court as contempt. In any case in which an authority seeks the enforcement of a subpoena issued pursuant to subsection (a) or (b) of this section, the authority shall request the Attorney General to petition any district court in which a hearing under this chapter is being conducted, or in which the person receiving the subpoena resides or conducts business, to issue such an order.

(Added Pub. L. No. 99-509, title VI, §6103(a), Oct. 21, 1986, 100 Stat. 1944.)

§3805. Judicial review

(a)(1) A determination by a reviewing official under section 3803 of this title shall be final and shall not be subject to judicial review.

(2) Unless a petition is filed under this section, a determination under section 3803 of this title that a person is liable under section 3802 of this title shall be final and shall not be subject to judicial review.

(b)(1)(A) Any person who has been determined to be liable under section 3802 of this title pursuant to section 3803 of this title may obtain review of such determination in-

(i) the United States district court for the district in which such person resides or transacts business;

(ii) the United States district court for the district in which the claim or statement upon which the determination of liability is based was made, presented, or submitted; or

(iii) the United States District Court for the District of Columbia.

(B) Such review may be obtained by filing in any such court a written petition that such determination be modified or set aside. Such petition shall be filed-

(i) only after such person has exhausted all administrative remedies under this chapter; and

(ii) within 60 days after the date on which the authority head sends such person a copy of the decision of such authority head under section 3803(i)(2) of this title.

(2) The clerk of the court shall transmit a copy of a petition filed under paragraph (1) of this subsection to the authority and to the Attorney General. Upon receipt of the copy of such petition, the authority shall transmit to the Attorney General the record in the proceeding resulting in the determination of liability under section 3802 of this title. Except as otherwise provided in this section, the district courts of the United States shall have jurisdiction to review the decision, findings, and determinations in issue and to affirm, modify, remand for further consideration, or set aside, in whole or in part, the decision, findings, and determinations of the authority, and to enforce such decision, findings, and determinations to the extent that such decision, findings, and determinations are affirmed or modified.

(c) The decisions, findings, and determinations of the authority with respect to questions of fact shall be final and conclusive, and shall not be set aside unless such decisions, findings, and determinations are found by the court to be unsupported by substantial evidence. In concluding whether the decisions, findings, and determinations of an authority are unsupported by substantial evidence, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(d) Any district court reviewing under this section the decision, findings, and determinations of an authority shall not consider any objection that was not raised in the hearing conducted pursuant to section 3803(f) of this title unless a demonstration is made of extraordinary circumstances causing the failure to raise the objection. If any party demonstrates to the satisfaction of the court that additional evidence not presented at such hearing is material and that there were reasonable grounds for the failure to present such evidence at such hearing, the court shall remand the matter to the authority for consideration of such additional evidence.

(e) Upon a final determination by the district court that a person is liable under section 3802 of this title, the court shall enter a final judgment for the appropriate amount in favor of the United States.

(Added Pub. L. No. 99-509, title VI, §6103(a), Oct. 21, 1986, 100 Stat. 1944.)

§3806. Collection of civil penalties and assessments

(a) The Attorney General shall be responsible for judicial enforcement of any civil penalty or assessment imposed pursuant to the provisions of this chapter.

(b) Any penalty or assessment imposed in a determination which has become final pursuant to this chapter may be recovered in a civil action brought by the Attorney General. In any such action, no matter that was raised or that could have been raised in a hearing conducted under section 3803(f) of this title or pursuant to judicial review under section 3805 of this title may be raised as a defense, and the determination of liability and the determination of amounts of penalties and assessments shall not be subject to review.

(c) The district courts of the United States shall have jurisdiction of any action commenced by the United States under subsection (b) of this section.

(d) Any action under subsection (b) of this section may, without regard to venue requirements, be joined and consolidated with or asserted as a counterclaim, cross-claim, or setoff by the United States in any other civil action which includes as parties the United States and the person against whom such action may be brought.

(e) The United States Claims Court shall have jurisdiction of any action under subsection (b) of this section to recover any penalty or assessment if the cause of action is asserted by the United States as a counterclaim in a matter pending in such court.

(f) The Attorney General shall have exclusive authority to compromise or settle any penalty or assessment the determination of which is the subject of a pending petition pursuant to section 3805 of this title or a pending action to recover such penalty or assessment pursuant to this section.

(g)(1) Except as provided in paragraph (2) of this subsection, any amount of penalty or assessment collected under this chapter shall be deposited as miscellaneous receipts in the Treasury of the United States.

(2)(A) Any amount of a penalty or assessment imposed by the United States Postal Service under this chapter shall be deposited in the Postal Service Fund established by section 2003 of title 39.

(B) Any amount of a penalty or assessment imposed by the Secretary of Health and Human Services under this chapter with respect to a claim or statement made in connection with old age and survivors benefits under title II of the Social Security Act shall be deposited in the Federal Old-Age and Survivors Insurance Trust Fund.

(C) Any amount of a penalty or assessment imposed by the Secretary of Health and Human Services under this chapter with respect to a claim or statement made in connection with disability benefits under title II of the

Social Security Act shall be deposited in the Federal Disability Insurance Trust Fund.

(D) Any amount of a penalty or assessment imposed by the Secretary of Health and Human Services under this chapter with respect to a claim or statement made in connection with benefits under part A of title XVIII of the Social Security Act shall be deposited in the Federal Hospital Insurance Trust Fund.

(E) Any amount of a penalty or assessment imposed by the Secretary of Health and Human Services under this chapter with respect to a claim or statement made in connection with benefits under part B of title XVIII of the Social Security Act shall be deposited in the Federal Supplementary Medical Insurance Trust Fund.

(Added Pub. L. No. 99-509, title VI, §6103(a), Oct. 21, 1986, 100 Stat. 1945.)

§3807. Right to administrative offset

(a) The amount of any penalty or assessment which has become final under section 3803 of this title, or for which a judgment has been entered under section 3805(e) or 3806 of this title, or any amount agreed upon in a settlement or compromise under section 3803(j) or 3806(f) of this title, may be collected by administrative offset under section 3716 of this title, except that an administrative offset may not be made under this subsection against a refund of an overpayment of Federal taxes, then or later owing by the United States to the person liable for such penalty or assessment.

(b) All amounts collected pursuant to this section shall be remitted to the Secretary of the Treasury for deposit in accordance with section 3806(g) of this title.

(Added Pub. L. No. 99-509, title VI, §6103(a), Oct. 21, 1986, 100 Stat. 1947.)

§3808. Limitations

(a) A hearing under section 3803(d)(2) of this title with respect to a claim or statement shall be commenced within 6 years after the date on which such claim or statement is made, presented, or submitted.

(b) A civil action to recover a penalty or assessment under section 3806 of this title shall be commenced within 3 years after the date on which the determination of liability for such penalty or assessment becomes final.

(c) If at any time during the course of proceedings brought pursuant to this chapter the authority head receives or discovers any specific information regarding bribery, gratuities, conflict of interest, or other corruption or similar activity in relation to a false claim or statement, the authority head shall immediately report such information to the Attorney General, and in the case of an authority in which an Office of Inspector General is established by the Inspector General Act of 1978 or by any other Federal law, to the Inspector General of that authority.

(Added Pub. L. No. 99-509, title VI, §6103(a), Oct. 21, 1986, 100 Stat. 1947.)

References in Text

The Inspector General Act of 1978, referred to in subsec. (c), is Pub. L. No. 95-452, Oct. 12, 1978, 92 Stat. 1101, as amended, which is set out in the Appendix to Title 5, Government Organization and Employees.

§3809. Regulations

Within 180 days after the date of enactment of this chapter, each authority head shall promulgate rules and regulations necessary to implement the provisions of this chapter. Such rules and regulations shall-

(1) ensure that investigating officials and reviewing officials are not responsible for conducting the hearing required in section 3803(f) of this title, making the determinations required by subsections (f) and (h) of section 3803 of this title, or making collections under section 3806 of this title; and

(2) require a reviewing official to include in any notice required by section 3803(a)(2) of this title a statement which specifies that the reviewing official has determined that there is a reasonable prospect of collecting, from a person with respect to whom the reviewing official is referring allegations of liability in such notice, the amount for which such person may be liable.

(Added Pub. L. No. 99-509, title VI, §6103(a), Oct. 21, 1986, 100 Stat. 1947.)

§3810. Reports

Not later than October 31 of each year, each authority head shall prepare and transmit to the appropriate committees and subcommittees of the Congress an annual report summarizing actions taken under this chapter during the most recent 12-month period ending the previous September 30. Such report shallinclude-

(1) a summary of matters referred by the investigating official of the authority to the reviewing official of the authority under section 3803(a)(1) of this title during such period;

(2) a summary of matters transmitted to the Attorney General under section 3803(a)(2) of this title during such period;

(3) a summary of all hearings conducted by presiding officers under section 3803(f) of this title, and the results of such hearings, during such period; and

(4) a summary of the actions taken during such period to collect any civil penalty or assessment imposed under this chapter.

(Added Pub. L. No. 99-509, title VI, §6103(a), Oct. 21, 1986, 100 Stat. 1947.)

§3811. Effect on other law

(a) This chapter does not diminish the responsibility of any agency to comply with the provisions of chapter 35 of title 44.

(b) This chapter does not supersede the provisions of section 3512 of title 44.

(c) For purposes of this section, the term "agency" has the same meaning as in section 3502(1) of title 44.

(Added Pub. L. No. 99-509, title VI, §6103(a), Oct. 21, 1986, 100 Stat. 1948.)

§3812. Prohibition against delegation

Any function, duty, or responsibility which this chapter specifies be carried out by the Attorney General or an Assistant Attorney General designated by the Attorney General, shall not be delegated to, or carried out by, any other officer or employee of the Department of Justice.
(Added Pub. L. No. 99-509, title VI, §6103(a), Oct. 21, 1986, 100 Stat. 1948.)

Department of Health and Human Services

Program Fraud Civil Remedies, 45 CFR Part 79 (1991)

PART 79—PROGRAM FRAUD CIVIL REMEDIES

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Authority: Secs. 6101-6104, Pub. L. 99-509, 100 Stat. 1874 (31 U.S.C. 3801-3812).

Source: 53 FR 11659, Apr. 8, 1988, unless otherwise noted.

§ 79.1 Basis and purpose.

(a) *Basis.* This part implements the Program Fraud Civil Remedies Act of 1986, Pub. L. 99-509, §§ 6101-6104, 100 Stat. 1874 (October 21, 1986), to be codified at 31 U.S.C. 3801-3812, 31 U.S.C. 3809 of the statute requires each authority head to promulgate regulations necessary to implement the provisions of the statute.

(b) *Purpose.* This part (1) establishes administrative procedures for imposing civil penalties and assessments against persons who make, submit, or present, or cause to be made, submitted, or presented, false, fictitious, or fraudulent claims or written statements to authorities or to their agents, and (2) specifies the hearing and appeal rights of persons subject to allegations of liability for such penalties and assessments.

§ 79.2 Definitions.

ALJ means an Administrative Law Judge in the authority appointed pursuant to 5 U.S.C. 3105 or detailed to the authority pursuant to 5 U.S.C. 3344.

Authority means the Department of Health and Human Services.

Authority head means the Departmental Grant Appeals Board of the Department of Health and Human Services.

Benefit means, in the context of "statement," anything of value, including but not limited to any advantage, preference, privilege, license, permit, favorable decision, ruling, status, or loan guarantee.

Claim means any request, demand, or submission—

(a) Made to the authority for property, services, or money (including money representing grants, loans, insurance, or benefits);

(b) Made to a recipient of property, services, or money from the authority or to a party to a contract with the authority—

(1) For property or services if the United States—

(i) Provided such property or services;

(ii) Provided any portion of the funds for the purchase of such property or services; or

(iii) Will reimburse such recipient or party for the purchase of such property or services; or

(2) For the payment of money (including money representing grants, loans, insurance, or benefits) if the United States—

(i) Provided any portion of the money requested or demanded; or

(ii) Will reimburse such recipient or party for any portion of the money paid on such request or demand: or

(c) Made to the authority which has the effect of decreasing an obligation to pay or account for property, services, or money.

Complaint means the administrative complaint served by the reviewing official on the defendant under § 79.7.

Defendant means any person alleged in a complaint under § 79.7 to be liable for a civil penalty or assessment under § 79.3.

Department means the Department of Health and Human Services.

Government means the United States Government.

Individual means a natural person.

Initial decision means the written decision of the ALJ required by §§ 79.10 or 79.37, and includes a revised initial decision issued following a remand or a motion for reconsideration.

Investigating official means the Inspector General of the Department of Health and Human Services or an officer or employee of the Office of the Inspector General designated by the Inspector General and serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for grade GS-16 under the General Schedule.

Knows or has reason to know, means that a person, with respect to a claim or statement—

(a) Has actual knowledge that the claim or statement is false, fictitious, or fraudulent;

(b) Acts in deliberate ignorance of the truth or falsity of the claim or statement; or

(c) Acts in reckless disregard of the truth or falsity of the claim or statement.

Makes, wherever it appears, shall include the terms presents, submits, and causes to be made, presented, or submitted. As the context requires, *making* or *made,* shall likewise include the corresponding forms of such terms.

Person means any individual, partnership, corporation, association or private organization, and includes the plural of that term.

Representative means an attorney who is a member in good standing of the bar of any State, Territory, or possession of the United States or of the District of Columbia or the Commonwealth of Puerto Rico.

Reviewing official means the General Counsel of the Department or his or her designee who is—

(a) Not subject to supervision by, or required to report to, the investigating official;

(b) Not employed in the organizational unit of the authority in which the investigating official is employed; and

(c) Serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for grade GS-16 under the General Schedule.

Statement means any representation, certification, affirmation, document, record, or accounting or bookkeeping entry made—

(a) With respect to a claim or to obtain the approval or payment of a claim (including relating to eligibility to make a claim); or

(b) With respect to (including relating to eligibility for)—

(1) A contract with, or a bid or proposal for a contract with; or

(2) A grant, loan, or benefit from, the authority, or any State, political subdivision of a State, or other party,

if the United States Government provides any portion of the money or property under such contract or for such grant, loan, or benefit, or if the Government will reimburse such State, political subdivision, or party for any portion of the money or property under such contract or for such grant, loan, or benefit,

§ 79.3 Basis for civil penalties and assessments.

(a) *Claims.* (1) Except as provided in paragraph (c) of this section, any person who makes a claim that the person knows or has reason to know—

(i) Is false, fictitious, or fraudulent;

(ii) Includes, or is supported by, any written statement which asserts a material fact which is false, fictitious, or fraudulent;

(iii) Includes, or is supported by, any written statement that—

(A) Omits a material fact;

(B) Is false, fictitious, or fraudulent as a result of such omission; and

(C) Is a statement in which the person making such statement has a duty to include such material fact; or

(iv) Is for payment for the provision of property or services which the person has not provided as claimed,

shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than $5,000 for each such claim.

(2) Each voucher, invoice, claim form, or other individual request or demand for property, services, or money constitutes a separate claim.

(3) A claim shall be considered made to the authority, recipient, or party when such claim is actually made to an agent, fiscal intermediary, or other entity, including any State or political subdivision thereof, acting for or on behalf of the authority, recipient, or party.

(4) Each claim for property, services, or money is subject to a civil penalty regardless of whether such property, services, or money is actually delivered or paid.

(5) If the Government has made any payment (including transferred property or provided services) on a claim, a person subject to a civil penalty under paragraph (a)(1) of this section shall also be subject to an assessment of not more than twice the amount of such claim or that portion thereof that is determined to be in violation of paragraph (a)(1). Such assessment shall be in lieu of damages sustained by the Government because of such claim.

(b) *Statements.* (1) Except as provided in paragraph (c) of this section, any person who makes a written statement that—

(i) The person knows or has reason to know—

(A) Asserts a material fact which is false, fictitious, or fraudulent; or

(B) Is false, fictitious, or fraudulent because it omits a material fact that the person making the statement has a duty to include in such statement; and

(ii) Contains, or is accompanied by, an express certification or affirmation of the truthfulness and accuracy of the contents of the statement,

shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than $5,000 fo reach such statement.

(2) Each representation, certification, or affirmation constitutes a separate statement.

(3) A statement shall be considered made to the authority when such statement is actually made to an agent, fiscal intermediary, or other entity, including any State or political subdivision thereof, acting for or on behalf of the authority.

(c) *Applications for certain benefits.* (1) In the case of any claim or statement made by any individual relating to any of the benefits listed in paragraph (c)(2) of this section received by such individual, such individual may be held liable for penalties and assessments under this section only if such claim or statement is made by such individual in making application for such benefits with respect to such individual's eligibility to receive such benefits.

(2) For purposes of paragraph (c) of this section, the term "benefits" means—

(i) Benefits under the supplemental security income program under title XVI of the Social Security Act;

(ii) Old age, survivors, and disability insurance benefits under title II of the Social Security Act;

(iii) Benefits under title XVIII of the Social Security Act;

(iv) Aid to families with dependent children under a State plan approved under section 402(a) of the Social Security Act;

(v) Medical assistance under a State plan approved under section 1902(a) of the Social Security Act;

(vi) Benefits under title XX of the Social Security Act;

(vii) Benefits under section 336 of the Older Americans Act; or,

(viii) Benefits under the Low-Income Home Energy Assistance Act of 1981, which are intended for the personal use of the individual who receives the benefits or for a member of the individual's family.

(d) No proof of specific intent to defraud is required to establish liability under this section.

(e) In any case in which it is determined that more than one person is liable for making a claim or statement under this section, each such person may be held liable for a civil penalty.

(f) In any case in which it is determined that more than one person is liable for making a claim under this section on which the Government has made payment (including transferred property or provided services), an assessment may be imposed against any such person or jointly and severally against any combination of such persons.

§ 79.4 Investigation.

(a) If an investigating official concludes that a subpoena pursuant to the authority conferred by 31 U.S.C. 3804(a) is warranted—

(1) The subpoena so issued shall notify the person to whom it is addressed of the authority under which the subpoena is issued and shall identify the records or documents sought;

(2) The investigating official may designate a person to act on his or her behalf to receive the documents sought; and

(3) The person receiving such subpoena shall be required to tender to the investigating official, or the person designated to receive the documents, a certification that—

(i) The documents sought have been produced;

(ii) Such documents are not available and the reasons therefor; or

(iii) Such documents suitably identified, have been withheld based upon the assertion of an identified privilege.

(b) If the investigating official concludes that an action under the Program Fraud Civil Remedies Act may be warranted, the investigating official shall submit a report containing the findings and conclusions of such investigation to the reviewing official.

(c) Nothing in this section shall preclude or limit an investigating official's discretion to refer allegations directly to the Department of Justice for suit under the False Claims Act or other civil relief, or to defer or postpone a report or referral to the reviewing official to avoid interference with a criminal investigation or prosecution.

(d) Nothing in this section modifies any responsibility of an investigating official to report violations of criminal law to the Attorney General.

§ 79.5 Review by the reviewing official.

(a) If, based on the report of the investigating official under § 79.4(b), the reviewing official determines that there is adequate evidence to believe that a person is liable under § 79.3, the reviewing official shall transmit to the Attorney General a written notice of the reviewing official's attention to issue a complaint under § 79.7.

(b) Such notice shall include—

(1) A statement of the reviewing official's reasons for issuing a complaint;

(2) A statement specifying the evidence that supports the allegations of liability;

(3) A description of the claims or statements upon which the allegations of liability are based;

(4) An estimate of the amount of money, or the value of property, services, or other benefits, requested or demanded in violation of § 79.3 of this part;

(5) A statement of any exculpatory or mitigating circumstances that may relate to the claims or statements known by the reviewing official or the investigating official; and

(6) A statement that there is a reasonable prospect of collecting an ap-

propriate amount of penalties and assessments.

§ 79.6 Prerequisites for issuing a complaint.

(a) The reviewing official may issue a complaint under § 79.7 only if—

(1) The Department of Justice approves the issuance of a complaint in a written statement described in 31 U.S.C. 3803(b)(1), and

(2) In the case of allegations of liability under § 79.3(a) with respect to a claim, the reviewing official determines that, with respect to such claim or a group of related claims submitted at the same time such claim is submitted (as defined in paragraph (b) of this section), the amount of money, or the value of property or services, demanded or requested in violation of § 79.3(a) does not exceed $150,000.

(b) For the purposes of this section, a related group of claims submitted at the same time shall include only those claims arising from the same transaction (e.g., grant, loan, application, or contract) that are submitted simultaneously as part of a single request, demand, or submission.

(c) Nothing in this section shall be construed to limit the reviewing official's authority to join in a single complaint against a person claims that are unrelated or were not submitted simultaneously, regardless of the amount of money, or the value of property or services, demanded or requested.

§ 79.7 Complaint.

(a) On or after the date the Department of Justice approves the issuance of a complaint in accordance with 31 U.S.C. 3803(b)(1), the reviewing official may serve a complaint on the defendant, as provided in § 79.8.

(b) The complaint shall state—

(1) The allegations of liability against the defendant, including the statutory basis for liability, an identification of the claims or statements that are the basis for the alleged liability, and the reasons why liability allegedly arises from such claims or statements;

(2) The maximum amount of penalties and assessments for which the defendant may be held liable;

(3) Instructions for filing an answer to request a hearing, including a specific statement of the defendant's right to request a hearing by filing an answer and to be represented by a representative; and

(4) That failure to file an answer as set forth in § 79.9 will result in the imposition of the maximum amount of penalties and assessments without right to appeal, as provided in § 79.10.

(c) At the same time the reviewing official serves the complaint, he or she shall serve the defendant with a copy of these regulations.

§ 79.8 Service of complaint.

(a) Service of a complaint must be made by certified or registered mail or by delivery in any manner authorized by Rule 4(d) of the Federal Rules of Civil Procedure. Service is complete upon receipt.

(b) Proof of service, stating the name and address of the person on whom the complaint was served, and the manner and date of service, may be made by—

(1) Affidavit of the individual serving the complaint by delivery;

(2) A United States Postal Service return receipt card acknowledging receipt; or

(3) Written acknowledgment of receipt by the defendant or his or her representative.

§ 79.9 Answer.

(a) The defendant may request a hearing by filing an answer with the reviewing official within 30 days of service of the complaint. An answer shall be deemed to be a request for hearing.

(b) In the answer, the defendant—

(1) Shall admit or deny each of the allegations of liability made in the complaint;

(2) Shall state any defense on which the defendant intends to rely;

(3) May state any reasons why the defendant contends that the penalties and assessments should be less than the statutory maximum; and

(4) Shall state the name, address, and telephone number of the person authorized by the defendant to act as defendant's representative, if any.

(c) If the defendant is unable to file an answer meeting the requirements of paragraph (b) of this section within the time provided, the defendant, before that time expires, may file with the reviewing official a general answer denying liability and requesting a hearing, and a request for an extension of time within which to file an answer meeting the requirements of paragraph (b) of this section. As provided in § 79.11, the reviewing official shall file promptly with the ALJ the complaint, the general answer denying liability, and the request for an extension of time. For good cause shown, the ALJ may grant the defendant up to 30 additional days within which to file an answer meeting the requirements of paragraph (b) of this section.

§ 79.10 Default upon failure to file an answer.

(a) If the defendant does not file an answer within the time prescribed in § 79.9(a), the reviewing official may refer the complaint to the ALJ.

(b) Upon the referral of the complaint, the ALJ shall promptly serve on the defendant in the manner prescribed in § 79.8, a notice that an initial decision will be issued under this section.

(c) The ALJ shall assume the facts alleged in the complaint to be true and, if such facts establish liability under § 79.3, the ALJ shall issue an initial decision imposing the maximum amount of penalties and assessments allowed under the statute.

(d) Except as otherwise provided in this section, by failing to file a timely answer, the defendant waives any right to further review of the penalties and assessments imposed under paragraph (c) of this section, and the initial decision shall become final and binding upon the parties 30 days after it is issued.

(e) If, before such an initial decision becomes final, the defendant files a motion with the ALJ seeking to reopen on the grounds that extraordinary circumstances prevented the defendant from filing an answer, the initial decision shall be stayed pending the ALJ's decision on the motion.

(f) If, on such motion, the defendant can demonstrate extraordinary circumstances excusing the failure to file a timely answer, the ALJ shall withdraw the initial decision in paragraph (c) of this section, if such a decision has been issued, and shall grant the defendant an opportunity to answer the complaint.

(g) A decision of the ALJ denying a defendant's motion under paragraph (e) of this section is not subject to reconsideration under § 79.38.

(h) The defendant may appeal to the authority head the decision denying a motion to reopen by filing a notice of appeal with the authority head within 15 days after the ALJ denies the motion. The timely filing of a notice of appeal shall stay the initial decision until the authority head decides the issue.

(i) If the defendant files a timely notice of appeal with the authority head, the ALJ shall forward the record of the proceeding to the authority head.

(j) The authority head shall decide expeditiously whether extraordinary circumstances excuse the defendant's failure to file a timely answer based solely on the record before the ALJ.

(k) If the authority head decides that extraordinary circumstances excuse the defendant's failure to file a timely answer, the authority head shall remand the case to the ALJ with instructions to grant the defendant an opportunity to answer.

(l) If the authority head decides that the defendant's failure to file a timely answer is not excused, the authority head shall reinstate the initial decision of the ALJ, which shall become final and binding upon the parties 30 days after the authority head issues such decision.

§ 79.11 Referral of complaint and answer to the ALJ.

Upon receipt of an answer, the reviewing official shall file the complaint and answer with the ALJ.

§ 79.12 Notice of hearing.

(a) When the ALJ receives the complaint and answer, the ALJ shall promptly serve a notice of hearing upon the defendant in the manner prescribed by § 79.8. At the same time, the ALJ shall send a copy of such notice to the representative for the Government.

(b) Such notice shall include—

(1) The tentative time and place, and the nature of the hearing;

(2) The legal authority and jurisdiction under which the hearing is to be held;

(3) The matters of fact and law to be asserted;

(4) A description of the procedures for the conduct of the hearing;

(5) The name, address, and telephone number of the representative of the Government and of the defendant, if any; and

(6) Such other matters as the ALJ deems appropriate.

§ 79.13 Parties to the hearing.

(a) The parities to the hearing shall be the defendant and the authority.

(b) Pursuant to 31 U.S.C. 3730(c)(5), a private plaintiff under the False Claims Act may participate in these proceedings to the extent authorized by the provisions of that Act.

§ 79.14 Separation of functions.

(a) The investigating official, the reviewing official, and any employee or agent of the authority who takes part in investigating, preparing, or presenting a particular case may not, in such case or a factually related case—

(1) Participate in the hearing as the ALJ;

(2) Participate or advise in the initial decision or the review of the initial decision by the authority head, except as a witness or a representative in public proceedings; or

(3) Make the collection of penalties and assessments under 31 U.S.C. 3806.

(b) The ALJ shall not be responsible to, or subject to the supervision or direction of, the investigating official or the reviewing official.

(c) Except as provided in paragraph (a) of this section, the representative for the Government may be employed anywhere in the authority, including in the offices of either the investigating official or the reviewing official.

§ 79.15 Ex parte contacts.

No party or person (except employees of the ALJ's office) shall communciate in any way with the ALJ on any matter at issue in a case, unless on notice and opportunity for all parties to participate. This provision does not prohibit a person or party from inquiring about the status of a case or asking routine questions concerning administrative functions or procedures.

§ 79.16 Disqualification of reviewing official or ALJ.

(a) A reviewing official or ALJ in a particular case may disqualify himself or herself at any time.

(b) A party may file with the ALJ a motion for disqualification of a reviewing official or an ALJ. Such motion shall be accompanied by an affidavit alleging personal bias or other reason for disqualification.

(c) Such motion and affidavit shall be filed promptly upon the party's discovery of reasons requiring disqualification, or such objections shall be deemed waived.

(d) Such affidavit shall state specific facts that support the party's belief that personal bias or other reason for disqualification exists and the time and circumstances of the party's discovery of such facts. It shall be accompanied by a certificate of the representative of record that it is made in good faith.

(e) Upon the filing of such a motion and affidavit, the ALJ shall proceed no further in the case until he or she resolves the matter of disqualification in accordance with paragraph (f) of this section.

(f)(1) If the ALJ determines that a reviewing official is disqualified, the ALJ shall dismiss the complaint without prejudice.

(2) If the ALJ disqualifies himself or herself, the case shall be reassigned promptly to another ALJ.

(3) If the ALJ denies a motion to disqualify, the authority head may determine the matter only as part of his or her review of the initial decision upon appeal, if any.

§ 79.17 Rights of parties.

Except as otherwise limited by this part, all parties may—

(a) Be accompanied, represented, and advised by a representative;

(b) Participate in any conference held by the ALJ;

(c) Conduct discovery;

(d) Agree to stipulations of fact or law, which shall be made part of the record;

(e) Present evidence relevant to the issues at the hearing;

(f) Present and cross-examine witnesses;

(g) Present oral arguments at the hearing as permitted by the ALJ; and

(h) Submit written briefs and proposed findings of fact and conclusions of law after the hearing.

§ 79.18 Authority of the ALJ.

(a) The ALJ shall conduct a fair and impartial hearing, avoid delay, maintain order, and assure that a record of the proceeding is made.

(b) The ALJ has the authority to—

(1) Set and change the date, time, and place of the hearing upon reasonable notice to the parties;

(2) Continue or recess the hearing in whole or in part for a reasonable period of time;

(3) Hold conferences to identify or simplify the issues, or to consider other matters that may aid in the expeditious disposition of the proceeding;

(4) Administer oaths and affirmations;

(5) Issue subpoenas requiring the attendance of witnesses and the production of documents at depositions or at hearings;

(6) Rule on motions and other procedural matters;

(7) Regulate the scope and timing of discovery;

(8) Regulate the course of the hearing and the conduct of representatives and parties;

(9) Examine witnesses;

(10) Receive, rule on, exclude, or limit evidence;

(11) Upon motion of a party, take official notice of facts;

(12) Upon motion of a party, decide cases, in whole or in part, by summary judgment where there is no disputed issue of material fact;

(13) Conduct any conference, argument, or hearing on motions in person or by telephone; and

(14) Exercise such other authority as is necessary to carry out the responsibilities of the ALJ under this part.

(c) The ALJ does not have the authority to find Federal statutes or regulations invalid.

§ 79.19 Prehearing conferences.

(a) The ALJ may schedule prehearing conferences as appropriate.

(b) Upon the motion of any party, the ALJ shall schedule at least one prehearing conference at a reasonable time in advance of the hearing.

(c) The ALJ may use prehearing conferences to discuss the following:

(1) Simplication of the issues;

(2) The necessity or desirability of amendments to the pleadings, including the need for a more definite statement;

(3) Stipulations and admissions of fact——, or as to the contents and authenticity of documents;

(4) Whether the parties can agree to submission of the case on a stipulated record;

(5) Whether a party chooses to waive appearance at an oral hearing and to submit only documentary evidence (subject to the objection of other parties) and written argument;

(6) Limitation of the number of witnesses;

(7) Scheduling dates for the exchange of witness lists and of proposed exhibits;

(8) Discovery;

(9) The time and place for the hearing; and

(10) Such other matters as may tend to expedite the fair and just disposition of the proceedings.

(d) The ALJ may issue an order containing all matters agreed upon by the parties or ordered by the ALJ at a prehearing conference.

§ 79.20 Disclosure of documents.

(a) Upon written request to the reviewing official, the defendant may review any relevant and material documents, transcripts, records, and other materials that relate to the allegations set out in the complaint and upon which the findings and conclusions of the investigating official under § 79.4(b) are based, unless such documents are subject to a privilege under Federal law. Upon payment of fees for duplication, the defendant may obtain copies of such documents.

(b) Upon written request to the reviewing official, the defendant also may obtain a copy of all exculpatory information in the possession of the reviewing official or investigating official relating to the allegations in the complaint, even if it is contained in a document that would otherwise be privileged. If the document would otherwise be privileged, only that portion containing exculpatory information must be disclosed.

(c) The notice sent to the Attorney General from the reviewing official as described in § 79.5 is not discoverable under any circumstances.

(d) The defendant may file a motion to compel disclosure of the documents subject to the provisions of this section. Such a motion may only be filed with the ALJ following the filing of an answer pursuant to § 79.9.

§ 79.21 Discovery.

(a) The following types of discovery are authorized:

(1) Requests for production of documents for inspection and copying;

(2) Requests for admission of the contents or authenticity of any relevant document or of the truth of any revelant fact;

(3) Written interrogatories; and

(4) Depositions.

(b) For the purpose of this section and §§ 79.22 and 79.23, the term "documents" includes information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence. Nothing contained herein shall be interpreted to require the creation of a document.

(c) Unless mutually agreed to by the parties, discovery is available only as ordered by the ALJ. The ALJ shall regulate the timing of discovery.

(d) *Motions for discovery.* (1) A party seeking discovery may file a motion with the ALJ. Such a motion shall be accompanied by a copy of the requested discovery, or in the case of depositions, a summary of the scope of the proposed deposition.

(2) Within ten days of service, a party may file an opposition to the motion and/or a motion for protective order as provided in § 79.24.

(3) The ALJ may grant a motion for discovery only if he or she finds that the discovery sought—

(i) Is necessary for the expeditious, fair, and reasonable consideration of the issues;

(ii) Is not unduly costly or burdensome;

(iii) Will not unduly delay the proceeding; and

(iv) Does not seek privileged information.

(4) The burden of showing that discovery should be allowed is on the party seeking discovery.

(5) The ALJ may grant discovery subject to a protective order under § 79.24.

(e) *Depositions.* (1) If a motion for deposition is granted, the ALJ shall issue a subpoena for the deponent, which may require the deponent to produce documents. The subpoena shall specify the time and place at which the deposition will be held.

(2) The party seeking to depose shall serve the subpoena in the manner prescribed in § 79.8.

(3) The deponent may file with the ALJ a motion to quash the subpoena or a motion for a protective order within ten days of service.

(4) The party seeking to depose shall provide for the taking of a verbatim transcript of the deposition, which it shall make available to all other parties for inspection and copying.

(f) Each party shall bear its own costs of discovery.

§ 79.22 Exchange of witness lists, statements and exhibits.

(a) At least 15 days before the hearing or at such other time as may be ordered by the ALJ, the parties shall exchange witness lists, copies of prior statements of proposed witnesses, and copies of proposed hearing exhibits, including copies of any written statements that the party intends to offer in lieu of live testimony in accordance with § 79.33(b). At the time the above documents are exchanged, any party that intends to rely on the transcript of deposition testimony in lieu of live testimony at the hearing, if permitted

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by the ALJ, shall provide each party with a copy of the specific pages of the transcript it intends to introduce into evidence.

(b) If a party objects, the ALJ shall not admit into evidence the testimony of any witness whose name does not appear on the witness list or any exhibit not provided to the opposing party as provided above unless the ALJ finds good cause for the failure or that there is no prejudice to the objecting party.

(c) Unless another party objects within the time set by the ALJ, documents exchanged in accordance with paragraph (a) of this section shall be deemed to be authentic for the purpose of admissibility at the hearing.

§ 79.23 Subpoenas for attendance at hearing.

(a) A party wishing to procure the appearance and testimony of any individual at the hearing may request that the ALJ issue a subpoena.

(b) A subpoena requiring the attendance and testimony of an individual may also require the individual to produce documents at the hearing.

(c) A party seeking a subpoena shall file a written request therefor not less than 15 days before the date fixed for the hearing unless otherwise allowed by the ALJ for good cause shown. Such request shall specify any documents to be produced and shall designate the witnesses and describe the address and location thereof with sufficient particularity to permit such witnesses to be found.

(d) The subpoena shall specify the time and place at which the wintess is to appear and any documents the witness is to produce.

(e) The party seeking the subpoena shall serve it in the manner prescribed in § 79.8, except that a subpoena on a party or upon an individual under the control of a party may be served as prescribed in § 79.26(b).

(f) A party or the individual to whom the subpoena is directed may file with the ALJ a motion to quash the subpoena within ten days after service or on or before the time specified in the subpoena for compliance if it is less than ten days after service.

§ 79.24 Protective order.

(a) A party or a prospective witness or deponent may file a motion for a protective order with respect to discovery sought by an opposing party or with repect to the hearing, seeking to limit the availability or disclosure of evidence.

(b) In issuing a protective order, the ALJ may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) That the discovery not be had;

(2) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) That the discovery may be had only through a method of discovery other than that requested:

(4) That certain matters not be inquired into, or that the scope of discovery be limited to certain matters;

(5) That discovery be conducted with no one present except persons designated by the ALJ;

(6) That the contents of discovery or evidence be sealed;

(7) That a deposition after being sealed be opened only by order of the ALJ;

(8) That a trade secret or other confidential research, development, commercial information, or facts pertaining to any criminal investigation, proceeding, or other administrative investigation not be disclosed or be disclosed only in a designated way; or

(9) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the ALJ.

§ 79.25 Fees.

The party requesting a subpoena shall pay the cost of the fees and mileage of any witness subpoenaed in the amounts that would be payable to a witness in a proceeding in United States District Court. A check for witness fees and mileage shall accompany the subpoena when served, except that when a subpoena is issued on behalf of the authority, a check for witness fees and mileage need not accompany the subpoena.

§ 79.26 Form, filing and service of papers.

(a) *Form.* (1) Documents filed with the ALJ shall include an original and two copies.

(2) Every pleading and paper filed in the proceeding shall contain a caption setting forth the title of the action, the case number assigned by the ALJ, and a designation of the paper (*e.g.*, motion to quash subpoena).

(3) Every pleading and paper shall be signed by, and shall contain the address and telephone number of, the party or the person on whose behalf the paper was filed, or his or her representative.

(4) Papers are considered filed when they are mailed. Date of mailing may be established by a certificate from the party or its representative or by proof that the document was sent by certified or registered mail.

(b) *Service.* A party filing a document with the ALJ shall, at the time of filing, serve a copy of such document on every other party. Service upon any party of any document other than those required to be served as prescribed in § 79.8 shall be made by delivering a copy or by placing a copy of the document in the United States mail, postage prepaid, and addressed to the party's last known address. When a party is represented by a representative, service shall be made upon such representative in lieu of the actual party.

(c) *Proof of service.* A certificate of the individual serving the document by personal delivery or by mail, setting forth the manner of service, shall be proof of service.

§ 79.27 Computation of time.

(a) In computing any period of time under this part or in an order issued thereunder, the time begins with the day following the act, event, or default, and includes the last day of the period, unless it is a Saturday, Sunday, or legal holiday observed by the Federal government, in which event it includes the next business day.

(b) Except as provided in paragraph (c) of this section, when the period of time allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays observed by the Federal government shall be excluded from the computation.

(c) Where a document has been served or issued by placing it in the mail, an additional five calendar days will be added to the time permitted for any response.

§ 79.28 Motions.

(a) Any application to the ALJ for an order or ruling shall be by motion. Motions shall state the relief sought, the authority relied upon, and the facts alleged, and shall be filed with the ALJ and served on all other parties.

(b) Except for motions made during a prehearing conference or at the hearing, all motions shall be in writing. The ALJ may require that oral motions be reduced to writing.

(c) Within 15 days after a written motion is served, or such other time as may be fixed by the ALJ, any party may file a response to such motion.

(d) The ALJ may not grant a written motion before the time for filing responses thereto has expired, except upon consent of the parties or following a hearing on the motion, but may overrule or deny such motion without awaiting a response.

(e) The ALJ shall make a reasonable effort to dispose of all outstanding motions prior to the beginning of the hearing.

§ 79.29 Sanctions.

(a) The ALJ may sanction a person, including any party or representative, for—

(1) Failing to comply with an order, rule, or procedure governing the proceeding;

(2) Failing to prosecute or defend an action; or

(3) Engaging in other misconduct that interferes with the speedy, orderly, or fair conduct of the hearing.

(b) Any such sanction, including but not limited to those listed in paragraphs (c), (d), and (e) of this section, shall reasonably relate to the severity and nature of the failure or misconduct.

(c) When a party fails to comply with an order, including an order for taking a deposition, the production of evidence within the party's control, or a request for admission, the ALJ may—

(1) Draw an inference in favor of the requesting party with regard to the information sought;

(2) In the case of requests for admission, deem each matter of which an admission is requested to be admitted;

(3) Prohibit the party failing to comply with such order from introducing evidence concerning, or otherwise relying upon, testimony relating to the information sought; and

(4) Strike any part of the pleadings or other submissions of the party failing to comply with such request.

(d) If a party fails to prosecute or defend an action under this part commenced by service of a notice of hearing, the ALJ may dismiss the action or may issue an initial decision imposing penalties and assessments.

(e) The ALJ may refuse to consider any motion, request, response, brief or other document which is not filed in a timely fashion.

§ 79.30 The hearing and burden of proof.

(a) The ALJ shall conduct a hearing on the record in order to determine whether the defendant is liable for a civil penalty or assessment under § 79.3 and, if so, the appropriate amount of any such civil penalty or assessment considering any aggravating or mitigating factors.

(b) The authority shall prove defendant's liability and any aggravating factors by a preponderance of the evidence.

(c) The defendant shall prove any affirmative defenses and any mitigating factors by a preponderance of the evidence.

(d) The hearing shall be open to the public unless otherwise ordered by the ALJ for good cause shown.

§ 79.31 Determining the amount of penalties and assessments.

(a) In determining an appropriate amount of civil penalties and assessments, the ALJ and the authority head, upon appeal, should evaluate any circumstances that mitigate or aggravate the violation and should articulate in their opinions the reasons that support the penalties and assessments they impose. Because of the intangible costs of fraud, the expense of investigating such conduct, and the need to deter others who might be similarly tempted, ordinarily double damages and a significant civil penalty should be imposed.

(b) Although not exhaustive, the following factors are among those that may influence the ALJ and the authority head in determining the amount of penalties and assessments to impose with respect to the misconduct (i.e., the false, fictitious, or fraudulent claims or statements) charged in the complaint:

(1) The number of false, fictitious, or fraudulent claims or statements;

(2) The time period over which such claims or statements were made;

(3) The degree of the defendant's culpability with respect to the misconduct;

(4) The amount of money or the value of the property, services, or benefit falsely claimed;

(5) The value of the Government's actual loss as a result of the misconduct, including foreseeable consequential damages and the costs of investigation;

(6) The relationship of the amount imposed as civil penalties to the amount of the Government's loss;

(7) The potential or actual impact of the misconduct upon national defense, public health or safety, or public confidence in the management of Government programs and operations, including particularly the impact on the intended beneficiaries of such programs;

(8) Whether the defendant has engaged in a pattern of the same or similar misconduct;

(9) Whether the defendant attempted to conceal the misconduct;

(10) The degree to which the defendant has involved others in the misconduct or in concealing it;

(11) Where the misconduct of employees or agents is imputed to the defendant, the extent to which the defendant's practices fostered or attempted to preclude such misconduct;

(12) Whether the defendant cooperated in or obstructed an investigation of the misconduct;

(13) Whether the defendant assisted in identifying and prosecuting other wrongdoers;

(14) The complexity of the program or transaction, and the degree of the defendant's sophistication with respect to it, including the extent of the defendant's prior participation in the program or in similar transactions;

(15) Whether the defendant has been found, in any criminal, civil, or administrative proceeding, to have engaged in similar misconduct or to have dealt dishonestly with the Government of the United States or of a State, directly or indirectly; and

(16) The need to deter the defendant and others from engaging in the same or similar misconduct.

(c) Nothing in this section shall be construed to limit the ALJ or the authority head from considering any other factors that in any given case may mitigate or aggravate the offense for which penalties and assessments are imposed.

§ 79.32 Location of hearing.

(a) The hearing may be held—

(1) In any judicial district of the United States in which the defendant resides or transacts business;

(2) In any judicial district of the United States in which the claim or statement in issue was made; or

(3) In such other place as may be agreed upon by the defendant and the ALJ.

(b) Each party shall have the opportunity to present argument with respect to the location of the hearing.

(c) The hearing shall be held at the place and at the time ordered by the ALJ.

§ 79.33 Witnesses.

(a) Except as provided in paragraph (b) of this section, testimony at the hearing shall be given orally by witnesses under oath or affirmation.

(b) At the discretion of the ALJ, testimony may be admitted in the form of a written statement or deposition. Any such written statement must be provided to all other parties along with the last known address of such witness, in a manner which allows sufficient time for other parties to subpoena such witness for cross-examination at the hearing. Prior written statements of witnesses proposed to testify at the hearing and deposition transcripts shall be exchanged as provided in § 79.22(a).

(c) The ALJ shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(d) The ALJ shall permit the parties to conduct such cross-examination as may be required for a full and true disclosure of the facts.

(e) At the discretion of the ALJ, a witness may be cross-examined on matters relevant to the proceeding without regard to the scope of his or her direct examination. To the extent permitted by the ALJ, cross-examination on matters outside the scope of direct examination shall be conducted in the manner of direct examination and may proceed by leading questions only if the witness is a hostile witness, an adverse party, or a witness identified with an adverse party.

(f) Upon motion of any party, the ALJ shall order witnesses excluded so that they cannot hear the testimony of other witnesses. This rule does not authorize exclusion of—

(1) A party who is an individual;

(2) In the case of a party that is not an individual, an officer or employee of the party appearing for the entity pro se or designated by the party's representative; or

(3) An individual whose presence is shown by a party to be essential to the presentation of its case, including an individual employed by the Government engaged in assisting the representative for the Government.

§ 79.34 Evidence.

(a) The ALJ shall determine the admissibility of evidence.

(b) Except as provided in this part, the ALJ shall not be bound by the Federal Rules of Evidence. However, the ALJ may apply the Federal Rules of Evidence where appropriate, *e.g.*, to exclude unreliable evidence.

(c) The ALJ shall exclude irrelevant and immaterial evidence.

(d) Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay or needless presentation of cumulative evidence.

(e) Although relevant, evidence may be excluded if it is privileged under Federal law.

(f) Evidence concerning offers of compromise or settlement shall be inadmissible to the extent provided in Rule 408 of the Federal Rules of Evidence.

(g) The ALJ shall permit the parties to introduce rebuttal witnesses and evidence.

(h) All documents and other evidence offered or taken for the record shall be open to examination by all parties, unless otherwise ordered by the ALJ pursuant to § 79.24.

§ 79.35 The record.

(a) The hearing will be recorded and transcribed. Transcripts may be obtained following the hearing from the ALJ at a cost not to exceed the actual cost of duplication.

(b) The transcript of testimony, exhibits and other evidence admitted at the hearing, and all papers and requests filed in the proceeding constitute the record for the decision by the ALJ and the authority head.

(c) The record may be inspected and copied (upon payment of a reasonable fee) by anyone, unless otherwise ordered by the ALJ pursuant to § 79.24.

§ 79.36 Post-hearing briefs.

The ALJ may require the parties to file post-hearing briefs. In any event, any party may file a post-hearing brief. The ALJ shall fix the time for filing such briefs, not to exceed 60 days from the date the party receives the transcript of the hearing or, if applicable, the stipulated record. Such briefs may be accompanied by proposed findings of fact and conclusions of law. The ALJ may permit the parties to file reply briefs.

§ 79.37 Initial decision.

(a) The ALJ shall issue an initial decision based only on the record, which shall contain findings of fact, conclusions of law, and the amount of any penalties and assessments imposed.

(b) The findings of fact shall include a finding on each of the following issues:

(1) Whether the claims or statements identified in the complaint, or any portions thereof, violate § 79.3;

(2) If the person is liable for penalties or assessments, the appropriate amount of any such penalties or assessments considering any mitigating or aggravating factors that he or she finds in the case, such as those described in § 79.31.

(c) The ALJ shall promptly serve the initial decision on all parties within 90 days after the time for submission of post-hearing briefs and reply briefs (if permitted) has expired. The ALJ shall at the same time serve all parties with a statement describing the right of any defendant determined to be liable for a civil penalty or assessment to file a motion for reconsideration with the ALJ or a notice of appeal with the authority head. If the ALJ fails to meet the deadline contained in this paragraph, he or she shall notify the parties of the reason for the delay and shall set a new deadline.

(d) Unless the initial decision of the ALJ is timely appealed to the authority head, or a motion for reconsideration of the initial decision is timely filed, the initial decision shall constitute the final decision of the authority head and shall be final and binding on the parties 30 days after it is issued by the ALJ.

§ 79.38 Reconsideration of initial decision.

(a) Except as provided in paragraph (d) of this section, any party may file a motion for reconsideration of the initial decision within 20 days of receipt of the initial decision. If service was made by mail, receipt will be presumed to be five days from the date of mailing in the absence of contrary proof.

(b) Every such motion must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. Such motion shall be accompanied by a supporting brief.

(c) Responses to such motions shall be allowed only upon request of the ALJ.

(d) No party may file a motion for reconsideration of an initial decision that has been revised in response to a previous motion for reconsideration.

(e) The ALJ may dispose of a motion for reconsideration by denying it or by issuing a revised initial decision.

(f) If the ALJ denies a motion for reconsideration, the initial decision shall constitute the final decision of the authority head and shall be final and binding on the parties 30 days after the ALJ denies the motion, unless the initial decision is timely appealed to the authority head in accordance with § 79.39.

(g) If the ALJ issues a revised initial decision, that decision shall constitute the final decision of the authority head and shall be final and binding on the parties 30 days after it is issued, unless it is timely appealed to the authority head in accordance with § 79.39.

§ 79.39 Appeal to authority head.

(a) Any defendant who has filed a timely answer and who is determined in an initial decision to be liable for a civil penalty or assessment may appeal such decision to the authority head by filing a notice of appeal with the authority head in accordance with this section.

(b)(1) A notice of appeal may be filed at any time within 30 days after the ALJ issues an initial decision. However, if another party files a motion for reconsideration under § 79.38, consideration of the appeal shall be stayed automatically pending resolution of the motion for reconsideration.

(2) If a motion for reconsideration is timely filed, a notice of appeal must be filed within 30 days after the ALJ denies the motion or issues a revised initial decision, whichever applies.

(3) If no motion for reconsideration is timely filed, a notice of appeal must be filed within 30 days after the ALJ issues the initial decision.

(4) The authority head may extend the initial 30-day period for an additional 30-days if the defendant files with the authority head a request for an extension within the initial 30 day period and shows good cause.

(c) If the defendant files a timely notice of appeal with the authority head, and the time for filing motions for reconsideration under § 79.38 has expired, the ALJ shall forward the record of the proceeding to the authority head.

(d) A notice of appeal shall be accompanied by a written brief specifying exceptions to the initial decision and reasons supporting the exceptions.

(e) The representative for the Government may file a brief in opposition to exceptions within 30 days of receiving the notice of appeal and accompanying brief.

(f) There is no right to appear personally before the authority head.

(g) There is no right to appeal any interlocutory ruling by the ALJ.

(h) In reviewing the initial decision, the authority head shall not consider any objection that was not raised before the ALJ unless a demonstration is made of extraordinary circumstances causing the failure to raise the objection.

(i) If any party demonstrates to the satisfaction of the authority head that additional evidence not presented at such hearing is material and that there were reasonable grounds for the failure to present such evidence at such hearing, the authority head shall remand the matter to the ALJ for consideration of such additional evidence.

(j) The authority head may affirm, reduce, reverse, compromise, remand, or settle any penalty or assessment determined by the ALJ in any initial decision.

(k) The authority head shall promptly serve each party to the appeal with a copy of the decision of the authority head and a statement describing the right of any person determined to be liable for a penalty or assessment to seek judicial review.

(l) Unless a petition for review is filed as provided in 31 U.S.C. 3805 after a defendant has exhausted all administrative remedies under this part and within 60 days after the date on which the authority head serves the defendant with a copy of the authority head's decision, a determination that a defendant is liable under § 79.3 is final and is not subject to judicial review.

§ 79.40 Stays ordered by the Department of Justice.

If at any time the Attorney General or an Assistant Attorney General designated by the Attorney General transmits to the authority head a written finding that continuation of the administrative process described in this part with respect to a claim or statement may adversely affect any pending or potential criminal or civil action related to such claim or statement, the authority head shall stay the process immediately. The authority head may order the process resumed only upon receipt of the written authorization of the Attorney General.

§ 79.41 Stay pending appeal.

(a) An initial decision is stayed automatically pending disposition of a motion for reconsideration or of an appeal to the authority head.

(b) No administrative stay is available following a final decision of the authority head.

§ 79.42 Judicial review.

Section 3805 of title 31, United States Code, authorizes judicial review by an appropriate United States District Court of a final decision of the authority head imposing penalties or assessments under this part and specifies the procedures for such review.

§ 79.43 Collection of civil penalties and assessments.

Sections 3806 and 3808(b) of title 31, United States Code, authorize actions for collection of civil penalties and assessments imposed under this part and specify the procedures for such actions.

§ 79.44 Right to administrative offset.

The amount of any penalty or assessment which has become final, or for which a judgment has been entered under § 79.42 or § 79.43, or any amount agreed upon in a compromise or settlement under § 79.46, may be collected by administrative offset under 31 U.S.C. 3716, except that an administrative offset may not be made under this subsection against a refund of an overpayment of Federal taxes, then or later owing by the United States to the defendant.

§ 79.45 Deposit in Treasury of United States.

All amounts collected pursuant to this part shall be deposited as miscellaneous receipts in the Treasury of the United States, except as provided in 31 U.S.C. 3806(g).

§ 79.46 Compromise or settlement.

(a) Parties may make offers of compromise or settlement at any time.

(b) The reviewing official has the exclusive authority to compromise or settle a case under this part at any time after the date on which the reviewing official is permitted to issue a complaint and before the date on which the ALJ issues an initial decision.

(c) The authority head has exclusive authority to compromise or settle a case under this part at any time after the date on which the ALJ issues an initial decision, except during the pendency of any review under § 79.42 or during the pendency of any action to collect penalties and assessments under § 79.43.

(d) The Attorney General has exclusive authority to compromise or settle a case under this part during the pendency of any review under § 79.42 or of any action to recover penalties and assessments under 31 U.S.C. 3806.

(e) The investigating official may recommend settlement terms to the reviewing official, the authority head, or the Attorney General, as appropriate. The reviewing official may recommend settlement terms to the authority head, or the Attorney General, as appropriate.

(f) Any compromise or settlement must be in writing.

§ 79.47 Limitations.

(a) The notice of hearing with respect to a claim or statement must be served in the manner specified in § 79.8 within 6 years after the date on which such claim or statement is made.

(b) If the defendant fails to file a timely answer, service of a notice under § 79.10(b) shall be deemed a notice of hearing for purposes of this section.

(c) The statute of limitations may be extended by agreement of the parties.

Regulatory Flexibility Act

Citations:

5 U.S.C. §§601-612 (1988); enacted September 19, 1980 by Pub. L. No. 96-354, 94 Stat. 1164-1170.

Lead Agency:

U.S. Small Business Administration, Chief Counsel for Advocacy, 3rd Street SW, 7th floor, Washington, DC 20416 (202) 205-6532.

Overview:

Requirements. The Regulatory Flexibility Act requires agencies to consider the special needs and concerns of small entities whenever they engage in rulemaking subject to the notice-and-comment requirements of the APA or other laws. Each time it publishes a proposed rule in the Federal Register, an agency must prepare and publish a regulatory flexibility analysis (RFA) describing the impact of the proposed rule on small entities (including small businesses, organizations, and governmental jurisdictions), unless the agency head certifies that the proposed rule will not "have a significant economic impact on a substantial number of small entities." The initial RFA, like the proposed rule itself, is subject to public comment, and the agency is encouraged to facilitate participation by small entities by providing actual notice of the proceeding to affected small entities, holding conferences and public hearings on the proposed rule as it affects small entities, and transmitting copies of its initial RFAs to the Chief Counsel for Advocacy of the Small Business Administration.

The final rule adopted by the agency must be accompanied by a final RFA that summarizes and responds to the comments received.

The Act does not mandate any particular outcome in rulemaking; it encourages, but does not require, the "tiering" of government regulations through a number of techniques designed to make them less burdensome to small entities. An agency's initial RFA must identify any "significant alternatives" to the proposed regulation that might achieve its goals while minimizing the impact on small entities. Approaches suggested in the statute include modifying compliance or reporting timetables, simplifying compliance or reporting requirements, using performance rather than design standards, and exempting small entities from certain requirements. The final RFA must explain why any such significant alternatives to the rule were not adopted.

Agencies must publish semiannual regulatory agendas identifying upcoming and current rulemaking proposals that may affect small entities. In addition, the Act directs agencies to apply regulatory flexibility analysis to their *existing* rules, initially evaluating them over a 10-year period and reviewing them periodically.

Coverage. The Act's limitations are important. It does not apply to the vast amount of administrative activity that is not rulemaking, whether it be adjudication or the large realm of informal action. Nor does it reach rulemaking that is not subject to notice-and-comment, such as interpretative rules and other rules exempted by the provisions of section 553 of the APA.

Issues Under the Act. Several issues have arisen under the Act, though few opinions have construed its terms owing to the Act's extremely limited provision for judicial review (§611). Echoing the statutory language, courts considering the judicial review provision have ruled that agency action under the Act is not subject to judicial review as such, although the contents of a regulatory flexibility analysis (including any defects it may contain) will form part of the record through which the courts determine a rule's reasonableness under the APA. *State of Michigan v. Thomas*, 805 F.2d 176 (6th Cir. 1986); *Thompson v. Clark*, 741 F.2d 401 (D.C. Cir. 1984). The D.C. Circuit noted in *Thompson* that the impact of a rule on small entities may be placed at issue in the public comments even when the agency has decided that it need not prepare an RFA.

In a later case, the D.C. Circuit explicitly reviewed (within the context of judicial review of the final rule) an agency's certification that a rule would not have a significant impact on small entities, *Mid-Tex Electric Cooperative, Inc. v. FERC*, 773 F.2d 327 (D.C. Cir. 1985), determining that the agency's certification was correct because it need only consider the rule's impact on regulated entities and not the indirect impact on small entities not regulated by the agency. A federal district court in the Third Circuit criticized *Mid-Tex*, ruling that because certifications under the Act are not RFAs, they are unreviewable even as part of the record on review of the final rule. *Lehigh Valley Farmers v. Block*, 640 F. Supp. 1497 (E.D. Pa. 1986), *aff'd*, 820 F.2d 409 (3d Cir. 1987).

Although these judicial interpretations have been helpful, uncertainties persist concerning the Act's coverage and its mandated process. Many of these are described in Paul Verkuil's study for the Conference, *A Critical Guide to the Regulatory Flexibility Act*. Moreover, according to the Small Business Administration's Chief Counsel for Advocacy, who monitors agency activity under the Regulatory Flexibility Act and issues annual reports, agency compliance with the Act has been very uneven, at least in part because of the lack of judicial review. An additional concern of some has been whether the Act has been as effective in reducing regulatory burdens for small governmental units as for small businesses. Senate oversight hearings in 1988 aired some of these issues, and legislation introduced, but not acted on, in the 101st Congress (S. 1758) proposed measures intended to improve implementation of the Act as it applies to small governments.

Legislative History:[1]

95th Congress. The Act was introduced originally as S. 1974 by Senators Culver and Nelson. Hearings on S. 1974 as amended were held on October 7, 1977 and August 23, 1978 before the Senate Subcommittee on Administrative Practice and Procedure, which unanimously reported S. 1974 to the Judiciary Committee on September 9, 1978. The Senate passed the bill on October 14, 1978. In the House of Representatives, H.R. 11376, the companion bill to S. 1974, was introduced on March 8, 1978 by Representatives Kastenmeier and Baldus, but no further action was taken.

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[1] Derived from Verkuil, 1982 Duke L.J. 227-229.

96th Congress. On January 31, 1979, Senator Culver reintroduced his original bill as S. 299. Three similar bills were introduced in the House of Representatives: H.R. 1971 (companion bill to S. 299, on February 8, 1979), H.R. 1745 (a similar bill, but cast as an amendment to the Small Business Act, on January 31, 1979) and H.R. 4660 (an expansion of H.R. 1745, on June 28). The latter bill became the principal bill in the House.

After extensive hearings, the Senate bill, S. 299, passed the Senate on August 6, 1980 in the form of a substitute, unprinted amendment intended to recodify the bill from 5 U.S.C. §§551, 552 to a new chapter within title 5 (sections 601-612). (See the Senate "Description of Major Issues" accompanying the amendment at 126 Cong. Rec. S10, 934-43 (daily ed. August 6, 1980).)

On September 8, 1980 the House of Representatives passed the Senate-passed version of S. 299 without amendment. The House held no separate hearings on the Senate bill; rather it simply adopted the Senate's "Description of Major Issues" and section-by-section analysis. The House did offer its own three-page "Discussion of the Issues" (126 Cong. Rec. H 8468-70 (daily ed. September 8, 1980)).

President Carter signed the bill into law on September 19, 1980.

Source Note:

The most extensive discussion of the Act's provisions is Verkuil's 1982 *Critical Guide*. The annual reports issued by the Small Business Administration's Office of Advocacy contain a wealth of information on agency implementation of the Act, as well as on the Act's strengths and weaknesses as identified by that Office. An in-depth prescription for legislative changes to the Regulatory Flexibility Act appears in the Dickinson Law Review article authored by a former Chief Counsel for Advocacy of the Small Business Administration and two staff members of the Office of Advocacy.

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3. *The Regulatory Flexibility Act: Joint Hearings on S. 1974 and S. 3330 Before the Subcomm. on Administrative Practice and Procedure, Senate Comm. on the Judiciary and Senate Select Comm. on Small Business,* 95th Cong., 2d Sess. (1978).

4. *Regulatory Reform: Hearings on S. 104, S. 262, S. 299, S. 755 and S. 1291 before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary,* 96th Cong., 1st Sess. (1979).

5. *Report to Accompany H.R. 4660,* H.R. Rep. No. 519, 96th Cong., 1st Sess. (1979).

6. *Report to Accompany S. 1974,* S. Rep. No. 1322, 95th Cong., 2d Sess. (1978).

7. *Report to Accompany S. 299,* S. Rep. No. 878, 96th Cong., 2d Sess. (1980), *reprinted in* 1980 U.S. Code Cong. & Ad. News 2788.

II. Other Government Documents

1. Food and Drug Administration, U.S. Dept. of Health and Human Services, *Flexible Regulatory Alternatives: A Guide for FDA Managers, Regulation Writers and Developers* (1981).

2. General Accounting Office, *Regulatory Flexibility Act: Inherent Weaknesses May Limit Its Usefulness for Small Governments*, GAO/HRD-91-16 (January 1991).

3. Office of the Chief Counsel for Advocacy, U.S. Small Business Administration, *Annual Report of the Chief Counsel for Advocacy on Implementation of the Regulatory Flexibility Act* (December 1989). (See also reports from 1983-1988.)

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6. *Regulatory Flexibility Act: Joint Oversight Hearing on the Operation of the Act and on S. 2170 before the Subcomm. on Regulatory Reform, Senate Comm. on the Judiciary and Subcomm. on Government Regulation and Paperwork, Senate Comm. on Small Business,* 97th Cong. 2d Sess. (1982).

7. *Regulatory Reform Initiatives: Hearings before the Senate Committee on Governmental Affairs,* 100th Cong., 2d Sess. (1988).

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III. Books and Articles

1. Freedman, Singer, and Swain, *The Regulatory Flexibility Act: Orienting Federal Regulation Toward Small Business*, 93 Dickinson L. Rev. 439 (1989).

2. Stewart, *The New Federal Regulatory Flexibility Act,* 67 A.B.A.J. 66 (1981).

3. Verkuil, *A Critical Guide to the Regulatory Flexibility Act,* Report to the Administrative Conference of the U.S., 1981 ACUS 203, *reprinted in* 1982 Duke L.J. 213.

Appendix:

1. Regulatory Flexibility Act, 5 U.S.C. §§601-612 (1988).

Regulatory Flexibility Act

Title 5, U.S. Code

Chapter 6--The Analysis of Regulatory Functions

§601. Definitions.
§602. Regulatory agenda.
§603. Initial regulatory flexibility analysis.
§604. Final regulatory flexibility analysis.
§605. Avoidance of duplicative or unnecessary analyses.
§606. Effect on other law.
§607. Preparation of analyses.
§608. Procedure for waiver or delay of completion.
§609. Procedures for gathering comments.
§610. Periodic review of rules.
§611. Judicial review.
§612. Reports and intervention rights.

§601. Definitions

For purposes of this chapter-

(1) the term "agency" means an agency as defined in section 551(1) of this title;

(2) the term "rule" means any rule for which the agency publishes a general notice of proposed rulemaking pursuant to section 553(b) of this title, or any other law, including any rule of general applicability governing Federal grants to State and local governments for which the agency provides an opportunity for notice and public comment, except that the term "rule" does not include a rule of particular applicability relating to rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances therefor or to valuations, costs or accounting, or practices relating to such rates, wages, structures, prices, appliances, services, or allowances;

(3) the term "small business" has the same meaning as the term "small business concern" under section 3 of the Small Business Act, unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register;

(4) the term "small organization" means any not-for-profit enterprise which is independently owned and operated and is not dominant in its field, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register;

(5) the term "small governmental jurisdiction" means governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand, unless an agency establishes, after

opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and which are based on such factors as location in rural or sparsely populated areas or limited revenues due to the population of such jurisdiction, and publishes such definition(s) in the Federal Register; and

(6) the term "small entity" shall have the same meaning as the terms "small business", "small organization" and "small governmental jurisdiction" defined in paragraphs (3), (4) and (5) of this section.

(Added Pub. L. No. 96-354, §3(a), Sept. 19, 1980, 94 Stat. 1165.)

CONGRESSIONAL FINDINGS AND DECLARATION OF PURPOSE

Section 2 of Pub. L. No. 96-354 provided that:

"(a) The Congress finds and declares that-

"(1) when adopting regulations to protect the health, safety and economic welfare of the Nation, Federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public;

"(2) laws and regulations designed for application to large scale entities have been applied uniformly to small businesses, small organizations, and small governmental jurisdictions even though the problems that gave rise to government action may not have been caused by those smaller entities;

"(3) uniform Federal regulatory and reporting requirements have in numerous instances imposed unnecessary and disproportionately burdensome demands including legal, accounting and consulting costs upon small businesses, small organizations, and small governmental jurisdictions with limited resources;

"(4) the failure to recognize differences in the scale and resources of regulated entities has in numerous instances adversely affected competition in the marketplace, discouraged innovation and restricted improvements in productivity;

"(5) unnecessary regulations create entry barriers in many industries and discourage potential entrepreneurs from introducing beneficial products and processes;

"(6) the practice of treating all regulated businesses, organizations, and governmental jurisdictions as equivalent may lead to inefficient use of regulatory agency resources, enforcement problems, and, in some cases, to actions inconsistent with the legislative intent of health, safety, environmental and economic welfare legislation;

"(7) alternative regulatory approaches which do not conflict with the stated objectives of applicable statutes may be available which minimize the significant economic impact of rules on small businesses, small organizations, and small governmental jurisdictions;

"(8) the process by which Federal regulations are developed and adopted should be reformed to require agencies to solicit the ideas and comments of small businesses, small organizations, and small governmental jurisdictions to examine the impact of proposed and existing rules on such entities, and to review the continued need for existing rules.

"(b) It is the purpose of this Act [enacting this chapter] to establish as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration."

§602. Regulatory agenda

(a) During the months of October and April of each year, each agency shall publish in the Federal Register a regulatory flexibility agenda which shall contain-

(1) a brief description of the subject area of any rule which the agency expects to propose or promulgate which is likely to have a significant economic impact on a substantial number of small entities;

(2) a summary of the nature of any such rule under consideration for each subject area listed in the agenda pursuant to paragraph (1), the objectives and legal basis for the issuance of the rule, and an approximate schedule for completing action on any rule for which the agency has issued a general notice of proposed rulemaking,[1] and

(3) the name and telephone number of an agency official knowledgeable concerning the items listed in paragraph (1).

(b) Each regulatory flexibility agenda shall be transmitted to the Chief Counsel for Advocacy of the Small Business Administration for comment, if any.

(c) Each agency shall endeavor to provide notice of each regulatory flexibility agenda to small entities or their representatives through direct notification or publication of the agenda in publications likely to be obtained by such small entities and shall invite comments upon each subject area on the agenda.

(d) Nothing in this section precludes an agency from considering or acting on any matter not included in a regulatory flexibility agenda, or requires an agency to consider or act on any matter listed in such agenda.

(Added Pub. L. No. 96-354, §3(a), Sept. 19, 1980, 94 Stat. 1166.)

§603. Initial regulatory flexibility analysis

(a) Whenever an agency is required by section 553 of this title, or any other law, to publish general notice of proposed rulemaking for any proposed rule, the agency shall prepare and make available for public comment an initial regulatory flexibility analysis. Such analysis shall describe the impact of the proposed rule on small entities. The initial regulatory flexibility analysis or a summary shall be published in the Federal Register at the time of the publication of general notice of proposed rulemaking for the rule. The agency shall transmit a copy of the initial regulatory flexibility analysis to the Chief Counsel for Advocacy of the Small Business Administration.

(b) Each initial regulatory flexibility analysis required under this section shall contain-

(1) a description of the reasons why action by the agency is being considered;

(2) a succinct statement of the objectives of, and legal basis for, the proposed rule;

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[1] So in original. The comma probably should be a semicolon.

(3) a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply;

(4) a description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;

(5) an identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule.

(c) Each initial regulatory flexibility analysis shall also contain a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities. Consistent with the stated objectives of applicable statutes, the analysis shall discuss significant alternatives such as-

(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;

(2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities;

(3) the use of performance rather than design standards; and

(4) an exemption from coverage of the rule, or any part thereof, for such small entities.

(Added Pub. L. No. 96-354, §3(a), Sept. 19, 1980, 94 Stat. 1166.)

§604. Final regulatory flexibility analysis

(a) When an agency promulgates a final rule under section 553 of this title, after being required by that section or any other law to publish a general notice of proposed rulemaking, the agency shall prepare a final regulatory flexibility analysis. Each final regulatory flexibility analysis shall contain-

(1) a succinct statement of the need for, and the objectives of, the rule;

(2) a summary of the issues raised by the public comments in response to the initial regulatory flexibility analysis, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments; and

(3) a description of each of the significant alternatives to the rule consistent with the stated objectives of applicable statutes and designed to minimize any significant economic impact of the rule on small entities which was considered by the agency, and a statement of the reasons why each one of such alternatives was rejected.

(b) The agency shall make copies of the final regulatory flexibility analysis available to members of the public and shall publish in the Federal Register at the time of publication of the final rule under section 553 of this title a statement describing how the public may obtain such copies.

(Added Pub. L. No. 96-354, §3(a), Sept. 19, 1980, 94 Stat. 1167.)

§605. Avoidance of duplicative or unnecessary analyses

(a) Any Federal agency may perform the analyses required by sections 602, 603, and 604 of this title in conjunction with or as a part of any other agenda or analysis required by any other law if such other analysis satisfies the provisions of such sections.

(b) Sections 603 and 604 of this title shall not apply to any proposed or final rule if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. If the head of the agency makes a certification under the preceding sentence, the agency shall publish such certification in the Federal Register, at the time of publication of general notice of proposed rulemaking for the rule or at the time of publication of the final rule, along with a succinct statement explaining the reasons for such certification, and provide such certification and statement to the Chief Counsel for Advocacy of the Small Business Administration.

(c) In order to avoid duplicative action, an agency may consider a series of closely related rules as one rule for the purposes of sections 602, 603, 604 and 610 of this title.

(Added Pub. L. No. 96-354, §3(a), Sept. 19, 1980, 94 Stat. 1167.)

§606. Effect on other law

The requirements of sections 603 and 604 of this title do not alter in any manner standards otherwise applicable by law to agency action.

(Added Pub. L. No. 96-354, §3(a), Sept. 19, 1980, 94 Stat. 1168.)

§607. Preparation of analyses

In complying with the provisions of sections 603 and 604 of this title, an agency may provide either a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule, or more general descriptive statements if quantification is not practicable or reliable.

(Added Pub. L. No. 96-354, §3(a), Sept. 19, 1980, 94 Stat. 1168.)

§608. Procedure for waiver or delay of completion

(a) An agency head may waive or delay the completion of some or all of the requirements of section 603 of this title by publishing in the Federal Register, not later than the date of publication of the final rule, a written finding, with reasons therefor, that the final rule is being promulgated in response to an emergency that makes compliance or timely compliance with the provisions of section 603 of this title impracticable.

(b) Except as provided in section 605(b), an agency head may not waive the requirements of section 604 of this title. An agency head may delay the completion of the requirements of section 604 of this title for a period of not more than one hundred and eighty days after the date of publication in the Federal Register of a final rule by publishing in the Federal Register, not later than such date of publication, a written finding, with reasons therefor, that the final rule is being promulgated in response to an emergency that makes timely compliance with the provisions of section 604 of this title impracticable. If the agency has not prepared a final regulatory analysis pursuant to section 604 of this title within one hundred and eighty days from the date of publication of the final rule, such rule

shall lapse and have no effect. Such rule shall not be repromulgated until a final regulatory flexibility analysis has been completed by the agency.
(Added Pub. L. No. 96-354, §3(a), Sept. 19, 1980, 94 Stat. 1168.)

§609. Procedures for gathering comments

When any rule is promulgated which will have a significant economic impact on a substantial number of small entities, the head of the agency promulgating the rule or the official of the agency with statutory responsibility for the promulgation of the rule shall assure that small entities have been given an opportunity to participate in the rulemaking for the rule through techniques such as-

(1) the inclusion in an advanced notice of proposed rulemaking, if issued, of a statement that the proposed rule may have a significant economic effect on a substantial number of small entities;

(2) the publication of general notice of proposed rulemaking in publications likely to be obtained by small entities;

(3) the direct notification of interested small entities;

(4) the conduct of open conferences or public hearings concerning the rule for small entities; and

(5) the adoption or modification of agency procedural rules to reduce the cost or complexity of participation in the rulemaking by small entities.
(Added Pub. L. No. 96-354, §3(a), Sept. 19, 1980, 94 Stat. 1168.)

§610. Periodic review of rules

(a) Within one hundred and eighty days after the effective date of this chapter, each agency shall publish in the Federal Register a plan for the periodic review of the rules issued by the agency which have or will have a significant economic impact upon a substantial number of small entities. Such plan may be amended by the agency at any time by publishing the revision in the Federal Register. The purpose of the review shall be to determine whether such rules should be continued without change, or should be amended or rescinded, consistent with the stated objectives of applicable statutes, to minimize any significant economic impact of the rules upon a substantial number of such small entities. The plan shall provide for the review of all such agency rules existing on the effective date of this chapter within ten years of that date and for the review of such rules adopted after the effective date of this chapter within ten years of the publication of such rules as the final rule. If the head of the agency determines that completion of the review of existing rules is not feasible by the established date, he shall so certify in a statement published in the Federal Register and may extend the completion date by one year at a time for a total of not more than five years.

(b) In reviewing rules to minimize any significant economic impact of the rule on a substantial number of small entities in a manner consistent with the stated objectives of applicable statutes, the agency shall consider the following factors-

(1) the continued need for the rule;

(2) the nature of complaints or comments received concerning the rule from the public;

(3) the complexity of the rule;

(4) the extent to which the rule overlaps, duplicates or conflicts with other Federal rules, and, to the extent feasible, with State and local governmental rules; and

(5) the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.

(c) Each year, each agency shall publish in the Federal Register a list of the rules which have a significant economic impact on a substantial number of small entities, which are to be reviewed pursuant to this section during the succeeding twelve months. The list shall include a brief description of each rule and the need for and legal basis of such rule and shall invite public comment upon the rule.
(Added Pub. L. No. 96-354, §3(a), Sept. 19, 1980, 94 Stat. 1169.)

§611. Judicial review

(a) Except as otherwise provided in subsection (b), any determination by an agency concerning the applicability of any of the provisions of this chapter to any action of the agency shall not be subject to judicial review.

(b) Any regulatory flexibility analysis prepared under sections 603 and 604 of this title and the compliance or noncompliance of the agency with the provisions of this chapter shall not be subject to judicial review. When an action for judicial review of a rule is instituted, any regulatory flexibility analysis for such rule shall constitute part of the whole record of agency action in connection with the review.

(c) Nothing in this section bars judicial review of any other impact statement or similar analysis required by any other law if judicial review of such statement or analysis is otherwise provided by law.
(Added Pub. L. No. 96-354, §3(a), Sept. 19, 1980, 94 Stat. 1169.)

§612. Reports and intervention rights

(a) The Chief Counsel for Advocacy of the Small Business Administration shall monitor agency compliance with this chapter and shall report at least annually thereon to the President and to the Committees on the Judiciary of the Senate and House of Representatives, the Select Committee on Small Business of the Senate, and the Committee on Small Business of the House of Representatives.

(b) The Chief Counsel for Advocacy of the Small Business Administration is authorized to appear as amicus curiae in any action brought in a court of the United States to review a rule. In any such action, the Chief Counsel is authorized to present his views with respect to the effect of the rule on small entities.

(c) A court of the United States shall grant the application of the Chief Counsel for Advocacy of the Small Business Administration to appear in any such action for the purposes described in subsection (b).
(Added Pub. L. No. 96-354, §3(a), Sept. 19, 1980, 94 Stat. 1170.)

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